Nov 13. 78. Wm. N. H. Swayne

Oct. 1. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~328.~~ 67

JOHN Y. KEITH, PLAINTIFF IN ERROR,

vs.

E. A. CLARK, COLLECTOR OF STATE AND COUNTY REVENUE FOR MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED DECEMBER 13, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 328.

JOHN Y. KEITH, PLAINTIFF IN ERROR,

vs.

E. A. CLARK, COLLECTOR OF STATE AND COUNTY REVENUE FOR MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judges of the Supreme Court of the State of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court for the correction of errors, before you, between John Y. Keith and E. A. Clark, collector of state and county revenue for Madison county, in said state, a manifest error hath happened, to the great damage of the said John Y. Keith, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October, Anno Domini 1876, in the said Supreme Court, to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein
2 to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this second day of December, in the year of our Lord eighteen hundred and seventy-five, and of the independence of the United States the one hundreth.

[SEAL.] H. E. ANDREWS,
Clerk United States Circuit Court Western District Tenn.

3 Clerk's office of the Supreme Court of Tennessee, Jackson, Tennessee.

I certify that a copy of the within writ of error was filed in my office on the 4th day of December, 1875.

JNO. S. FREEMAN,
Clerk of the Supreme Court of Tennessee, at Jackson,

(Endorsed:) John Y. Keith vs. E. A. Clark, collector, &c. Writ of error.

4 UNITED STATES OF AMERICA, *ss.*

To E. A. Clark, collector of state and county revenue for Madison county, in the State of Tennessee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Tennessee, at Jackson, wherein John Y. Keith is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in

1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judges of the Supreme Court of the State of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court for the correction of errors, before you, between John Y. Keith and E. A. Clark, collector of state and county revenue for Madison county, in said state, a manifest error hath happened, to the great damage of the said John Y. Keith, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October, Anno Domini 1876, in the said Supreme Court, to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein
2 to correct that error, what of right, and according to the law and custom of the United States, should be done.

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4 UNITED STATES OF AMERICA, *ss.*

To E. A. Clark, collector of state and county revenue for Madison county, in the State of Tennessee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Tennessee, at Jackson, wherein John Y. Keith is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in

the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable A. O. P. Nicholson, Chief Justice of said Supreme Court of the State of Tennessee, this 4th day of December, in the year of our Lord eighteen hundred and seventy-five.

A. O. P. NICHOLSON,
Chief Justice, &c.

5 We hereby acknowledge service upon us of the within citation, this 4 day of Dcr., 1875.

E. A. CLARK,
Rev. Col. Madison Cty., Ten.

J. B. HEISKELL,
Attorney-General for the State of Tennessee.

(Endorsed:) John Y. Keith vs. E. A. Clark, collector, &c. Citation.

6 (Title page:) Transcript from Supreme Court, at Jackson, for the State of Tennessee. John Y. Keith, in error, vs. E. A. Clark, tax-collector, &c. A. W. Campbell, Caruthers & Mallory, attys. for plaintiff in error. J. B. Heiskell, Attorney-Genl. of Tennessee, for defendant in error. Clerk's fees for transcript, $7.50. Paid by E. A, Mallory, atty. for plff.

7 THE STATE OF TENNESSEE.

Pleas before the Supreme Court of the State of Tennessee for the Western Division, at Jackson, on the 4th Monday in September, A. D. 1875.

Present, Hon. A. O. P. Nicholson, chief justice, and Robert McFarland, Thomas J. Freeman, James W. Deaderick, Peter Turney, and John L. T. Sneed, associate judges. To wit:

Be it remembered, that heretofore, to wit, on the 11th day of September, 1875, the following transcript of a record was filed in the office of the clerk of the Supreme Court for the Western Division of the State of Tennessee, at Jackson, to wit:

JOHN Y. KEITH, PLAINTIFF IN ERROR,
v.
E. A. CLARK, TAX-COLLECTOR, &C., DEFENDANT IN ERROR.

THE STATE OF TENNESSEE,
MADISON COUNTY.

8 Be it remembered that on this, the 16th day of August, A. D. 1875, the law side of the common-law and chancery court of the county of Madison met in pursuance of an order made on the 17th July, 1875, being one of the days of the June term of this court, directing a special term to be opened and held

for the trial of causes on the state and civil dockets of this court, the same being Monday, 16th August, 1875.

Present, the Hon. Henry W. McCorry, judge, &c.; R. M. May, sheriff; and R. A. Sneed, clerk.

Appeal from Justices's Court.

Warrant issued 23d day of July, 1875.

THE STATE OF TENNESSEE,
MADISON COUNTY.

To the sheriff or any constable of said ——: You are hereby commanded to summon E. A. Clark (tax-collector for Madison county) to personally appear before me, or some other justice of the peace for said county, to answer the complaint of John Y. Keith for the recovery of forty dollars wrongfully collected from
9 him, and under protest, as taxes due to State of Tennessee.

Given under my hand, this 23rd day of July, 1875.

J. R. CHAPPELL, *J. P.*

Endorsement.

Came to hand same day issued, and executed as within commanded, and set for trial before J. R. Chappell, esqr., on the 23rd day of July, 1875, at 4 o'clock p. m., this July 23rd, 1875.

T. L. KENDRICK, *C. M. C.*

Judgment before Justice of the Peace, July 23rd, 1875.

JOHN Y. KEITH
vs.
E. A. CLARK, TAX-COLLECTOR, &c.

It appearing from the proof made by the plaintiff in this cause, that upon demand being made of him by the defendant for the state taxes due by the plaintiff, amounting to $\$40\frac{36}{100}$, and $\$1\frac{75}{100}$
10 interest thereon, for the year 1874, the plaintiff tendered in payment thereof $\$2\frac{11}{100}$ in U. S. currency and two bills issued by the Bank of Tennessee, of the denomination of $20 each, the one dated June 1st, 1861, and signed by G. C. Torbet, as president of said bank, and John A. Fisher, as cashier of said bank, numbered 2,845, letter "C," the other dated June 1st, 1854, and signed by G. C. Torbet, as president of said bank, and John A. Fisher, as cashier, and numbered 1,369, letter "A;" said notes being what is commonly called the "new issue," or the Torbet issue, of said bank; that the defendant refused to receive the two bills of the Bank of Tennessee, described as above, but demanded the amount due in such currency as he was entitled by law to receive in payment of state taxes; that the plaintiff thereupon paid forty dollars in addition to the $\$2\frac{11}{100}$ already paid in lawful currency of the United

States, under protest, in full satisfaction and discharge of his said state taxes.

11 The court is of opinion that the tender of $40.00 in bills of the Bank of Tennessee, above described, was not a tender in such currency as the defendant was by law entitled to receive, and, therefore, gives judgment against the plaintiff, John Y. Keith, in favor of the defendant, E. A. Clark, tax collector, &c., for the costs of this suit, for which let execution issue.

This 23rd day of July, 1875.

J. R. CHAPPELL, *J. P.*

From which judgment the plaintiff prays an appeal to the law side of the common-law chancery court of the county of Madison. Bond and security being given as required by law, the same is granted. This 23rd day of July, 1875.

J. R. CHAPPELL, *J. P.*

Filed July 26th, 1875. R. A. SNEED, *Clk.*

Appeal Bond. Filed July 23, 1875.

We, John Y. Keith and R. B. Hurt, acknowledge our-
12 selves indebted to E. A. Clark in the sum of two hundred and fifty dollars.

To be void on condition the said John Y. Keith shall prosecute successfully an appeal he has this day taken to the law side of common-law and chancery court of the county of Madison, from a judgment rendered against him by J. R. Chappell, a justice of the peace for said Madison county, in favor of E. A. Clark, tax-collector, &c., on the 23rd day of July, 1875, for costs, or in case of failure to do so, pay all costs that may be adjusted against him by the court.

Witness our hands, this 23rd day of July, 1875.

JOHN Y. KEITH.

Approved: J. R. CHAPPELL, *J. P.* ROBT. B. HURT.

Appeal from J. P. Judgment 24th day of August, 1875.

JOHN Y. KEITH
vs.
13 E. A. CLARK, COLLECTOR.

This day came the parties, by their attorneys, the attorney-general representing the defendant and the State of Tennessee, and by consent this cause is tried; and thereupon, a jury of good and lawful men came, to wit, J. H. Bell, A. A. Maynard, F. H. Weir, W. H. Owen, J. H. Gregory, J. R. Estis, Levi Hall, A. R. Weaks, Thos. Bond, John M. Smith, Henry Robinson, and Wm. Vantrice, who being duly sworn to try the issues joined between the plaintiff

and defendant, upon their oath do say, that they find for the defendant. It is, therefore, considered by the court, that the defendant go hence without day, and that he recover from the plaintiff and from his surety, Robt. B. Hurt, upon his appeal-bond, the costs of this suit. Whereupon, the plaintiff, by his attorneys, moves the court for a new trial upon the ground of error in the charge of the court in ruling that the restored state organization in 1865 could relieve the state from obligations to receive through its
14 collectors for state taxes bills of the Bank of Tennessee issued subsequently to May 6th, 1861, and during the existence of the state government hostile to that of the United States; which motion is, by the court, overruled. To which plaintiff excepts and presents to this court his bill of exceptions in this cause, which is, by this court, signed and sealed and made a part of the record of this cause. And thereupon, from the judgment of the court, and from its action in overruling said motion for a new trial, plaintiff prays an appeal in the nature of a writ of error to the next term of the Supreme Court of Tennessee, to be held at Jackson, on the 2nd Monday in September, 1875, which is granted, upon plaintiff giving bond and security for costs according to law.

Appeal Bond. Filed August 25th, 1875.

15 Know all men by these presents, that we, John Y. Keith, Robt. B. Hurt, and Allen Deberry, all of the county of Madison and State of Tennessee, are held and firmly bound unto E. H. Clark, tax-collector, &c., in the just and full sum of two hundred dollars, for the payment well and truly to be made we bind ourselves, our heirs, &c., jointly, severally, and firmly by these presents, and sealed with our seals, and dated this 25th day of August, 1875.

The condition of the above obligation is such, that whereas the above-bound John Y. Keith has prayed and obtained an appeal from the law side of the common-law and chancery court of the county of Madison, now in session in the city of Jackson, Tennessee, to the next supreme court to be held at Jackson on the second Monday in Sept. next, from a judgment which E. A. Clark, tax-collector, &c,, recovered against the said John Y. Keith for
16 the cost of suit. Now, if the said John Y. Keith shall well and truly prosecute said appeal with effect, or in case he be cast therein, shall stand to, abide by, and perform the judgment, sentence, and decree of said supreme court, then the above obligation to be void, otherwise in full force and virtue.

JOHN Y. KEITH. [SEAL.]
ROBT. B. HURT. [SEAL.]
ALLEN DEBERRY. [SEAL.]

Approved.
R. A. SNEED, *Clk.*

Bill of Exceptions. Filed 24th August, 1875.

JOHN Y. KEITH
vs.
E. A. CLARK, COLLECTOR OF STATE AND COUNTY REVENUE FOR MADISON COUNTY.

At the trial of the above-entitled cause plaintiff testified that he was a resident of Madison county, and was assessed in respect of his property in said county for state taxes for the year 1874,
17 in the amount of $40.36; that on the 20th day of July, 1875, defendant, the collector of state and county revenue for said county, demanded of plaintiff the payment of said state taxes, together with $1.75 interest due thereon, in all $42.11, whereupon plaintiff tendered to defendant in payment of said taxes $2.15 United States legal-tender currency, and $40.00 in bills of the Bank of Tennessee, *to wit*, two bills, each of the amount of $20.00, one dated June 1st, 1861, one June 1, 1854, both signed by G. C. Torbet as president of said bank, and John A. Fisher as cashier, and both having been issued by said bank subsequently to May 6, 1861, and being of what is known as the "new issue," or "Torbet issue," of said bank, and thereupon plaintiff claimed the right to pay taxes to defendant as such collector in said funds so tendered; that defendant then and there refused to receive said tender in payment of said taxes, demanding the entire amount thereof in legal-ten-
18 der currency, against which demand plaintiff then and there protested, upon the ground that, by virtue of section 12 of the acts of January 19, 1838, entitled "An act to establish a state bank," to raise a fund for internal improvement, and to aid in the establishment of a system of education," he was entitled to have said bills of said bank received, together with said $2\frac{15}{100}$ in legal-tender currency, in payment of said taxes; that, however, said collector persisting in his said demand, thereupon plaintiff then and there paid him the entire amount of said taxes, to wit, $42\frac{11}{100}$, in United States legal-tender currency, said payment being made under said protest on the 20th day of July, 1875, after which, on the 23rd day of July, 1875, within thirty days from and after the date of said payment, this suit was commenced by plaintiff to recover from defendant the amount claimed by plaintiff to have been
19 exacted of him by defendant in funds different and of greater value than those tendered him by plaintiff as aforesaid.

Defendant testified that upon plaintiff's making such payment as aforesaid to him as such collector as aforesaid, defendant paid said revenue into the state treasury, giving notice at the time of payment to the comptroller that the same had been paid by plaintiff under protest.

And the plaintiff produced in court and tendered to the defendant the two bills of $20.00 each of the Bank of Tennessee, which

were admitted to be genuine bills of said bank, and which have been hereinbefore more particularly described, and said bills were again refused by the defendant.

Also, plaintiff gave in evidence the charter of the Bank of Tennessee, section 12 of which is as follows:

"Be it enacted that the bills or notes of the said corporation (the Bank of Tennessee), originally made payable or which
20 shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of this state and by all tax-collectors and other public officers in all payments for taxes or other moneys due to the state."

It is agreed that no other portions of said charter need be copied into this record.

Plaintiff then introduced R. B. Hurt, who testified that at the time of the tender aforesaid, bills of Bank of Tennessee of the charter tendered were worth in the market about twenty-five cents on the dollar, and that they could be procured from the brokers at that price.

This was all the evidence in the foregoing case.

The court thereupon charged the jury that if the notes of the Bank of Tennessee tendered by plaintiff to defendant as aforesaid were issued by the bank subsequently to May 6, 1861, and
21 during the existence of the state government established at that date in hostility to the government of the United States, then defendant was not legally bound to receive them in payment of plaintiff's state taxes. That while during said period the bills issued by the Bank of Tennessee and the contracts made thereby with individuals were as against said bank valid and were entitled to be protected by the Constitution of the United States from subsequent state legislation impairing their obligation, yet section twelve of the charter of the bank could only have been operative upon the bills issued by the bank during said period through its re-enactment or tacit recognition by the then existing state government, and that this government had no power to commit the state to the contract expressed in section twelve for a longer period than the existence of the said government itself, and that consequently it was competent for the restored state government, in harmony with that of the United States, to refuse, by section 6, sched-
22 ule to constitutional amendment of 1865, to abide by the contract of the insurrectionary state government in 1861 to receive said issues of said bank in payment of taxes due the state, said contract not being entitled to the protection of the Constitution of the United States against repudiation at the hands of the restored state government. To which ruling plaintiff then and there excepted, and afterwards also excepted to the action of the court in overruling his motion for a new trial in said cause on account of said erroneous ruling of the court. And thereupon plaintiff tendered this his bill of exceptions to the court, which was

signed, sealed, and ordered to be made a part of the record of said cause.

This 24th day of August, 1875.

H. W. McCORRY, *Judge.* [SEAL.]

23 *Judgment of the Supreme Court.*

September Term, 1875.

And at, to wit, on the 13th day of November, 1875, being one of the days of the September term, 1875, of said court, the following judgment was pronounced in this cause, viz:

JOHN Y. KEITH
v.
E. A. CLARK, TAX-COLLECTOR OF Madison County. } No. 106, State Docket.

The parties appear by their attorneys, and thereupon the record, proceedings, and judgment of the court below in this cause being seen and fully understood by this court, and it appearing
24 that in the same there is no error, it is therefore considered by the court that the judgment aforesaid be in all things affirmed, and that the defendant in error go hence and recover of the plaintiff in error and R. B. Hurt and Allen DeBerry, his sureties on appeal bond, the costs of this cause in this court and the court below, for which let execution issue.

Order setting aside Judgment.

And afterwards, to wit, on the 29th November, 1875, also one of the days of the said September term of said court, the following order was entered and appears of record, to wit:

25 JOHN Y. KEITH
v.
E. A. CLARK, TAX-COLLECTOR OF MADISON County, Tennessee. } No. 106. State Docket.

Came the parties by their attorneys, and, for reasons satisfactory to the court, it is ordered that the judgment rendered on a former day of the present term be set aside and for naught held, and the cause reinstated on the docket.

Judgment of the Supreme Court.

And afterwards, to wit, on the 29th November, 1875, also one of the days of the said September term of said court, the fol-
26 lowing judgment was entered and appears of record, viz:

JOHN Y. KEITH
v.
E. A. CLARK, TAX-COLLECTOR OF MADISON County, Tennessee. } No. 106. State Docket.

The parties appear by their attorneys, and thereupon the record, proceedings, and judgment of the court below in this case being seen and fully understood by this court, and it appearing that in the same there is no error, it is therefore considered by the court that the judgment aforesaid be in all things affirmed, and that the defendant in error go hence and recover of the plaintiff in
27 error and R. B. Hurt and Allen Deberry, his sureties on appeal bond, the costs of this cause in this court and the court below, for which let execution issue.

Hon. James W. Deaderick, being incompetent in this cause, did not sit with the court on the hearing thereof.

Order granting Writ of Error.

And at, to wit, on the 2nd day of December, 1875, also one of the days of the September term, 1875, of said court, the following further order was entered and appears of record in this cause, viz:

JOHN Y. KEITH
v.
E. A. CLARK, TAX-COLLECTOR OF MADISON County, Tennessse. } No. 106. State Docket.

28 In this cause, on the application of the plaintiff in error, a writ of error was allowed him by the court to the next term of the Supreme Court of the United States, at Washington.

(In this case the opinion of the court was delivered orally, and no written opinion or memorandum filed.)

JOHN H. FREEMAN, *Clerk Sup. Ct.*
By S. D. HAYS, *D. Cl.*

29 *Writ of Error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judges of the Supreme Court of the State of Tennessee, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court for the correction of errors, before you, between John Y. Keith and E. A. Clark, collector of state and county revenue for Madison county, in said state, a manifest error hath happened, to the great damage of the said John Y. Keith, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 2d Monday of October, Anno Domini 1876, in the said Supreme Court, to be
30 then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this second day of December, in the year of our Lord eighteen hundred and seventy-five, and of the independence of the United States the one hundredth.

[L. S.] H. E. ANDREWS,
Clerk United States Circuit Court, Western District Tenn.

(Endorsed:) Clerk's office of the Supreme Court of Tennessee, Jackson, Tennessee. I certify that a copy of the within writ of error was filed in my office on the 4th day of December, 1875. Jno. H. Freeman, Clerk of the Supreme Court of Tennessee, at Jackson.

31 *Writ of Error Bond.*

Supreme Court of the United States.

JOHN Y. KEITH, IN ERROR,
vs.
E. A. CLARK, COLLECTOR OF THE STATE AND County Revenue for Madison County, State of Tennessee.

Know all men by these presents, that we, John Y. Keith, principal, and F. C. Maury and T. S. Marr, sureties, are held and firmly bound unto the above-named E. A. Clark, collector of the state and county revenue, in the sum of two hundred and fifty dollars, to be paid to the said E A. Clark, collector as aforesaid, his executors and administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 4th day of December, A. D. 1875.

Whereas the above-named John Y. Keith hath prosecuted a writ of error to the Supreme Court of the United States, to
32 reverse the judgment rendered in the above-entitled suit by the Supreme Court of Tennessee, sitting at Jackson, in said state: Now, therefore, the condition of the above obligation is such

that if the above-named John Y. Keith shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN Y. KEITH. [SEAL.]
F. C. MAURY. [SEAL.]
THOS. S. MARR. [SEAL.]

Sealed and delivered in presence of—
R. M. P. SMITH.

(Endorsed:) The within bond approved Decr. 4th, 1875. A. O. P. Nicholson, chief justice. Filed December 4th, 1875. John H. Freeman, clerk Supreme Ct. of Tennessee, at Jackson.

Citation.

UNITED STATES OF AMERICA, *ss.*

33 To E. A. Clark, collector of state and county revenue for Madison county, in the State of Tennessee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Tennessee, at Jackson, wherein John Y. Keith is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable A. O. P. Nicholson, Chief Justice of said Supreme Court of the State of Tennessee, this 4th day of December, in the year of our Lord eighteen hundred and seventy five.

A. O. P. NICHOLSON,
Chief Justice, &c.

(Endorsed:) We hereby acknowledge service upon us of
34 the within citation, this 4th day of December, 1875. E. A. Clark, Rev. Col. Madison cty., Tenn. J. B. Heiskell, Attorney-General for the State of Tennessee.

THE STATE OF TENNESSEE.

I, John H. Freeman, clerk of the supreme court of said state, at Jackson, for the western division thereof, do hereby certify that the above and foregoing comprises a full, true, and perfect transcript of the record in a certain cause lately therein pending, wherein John Y. Keith was plaintiff in error and E. A. Clark, tax-collector, &c., defendant in error, together with all the proceedings had therein, the same appearing of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the impress of the seal of said court, at office in the city

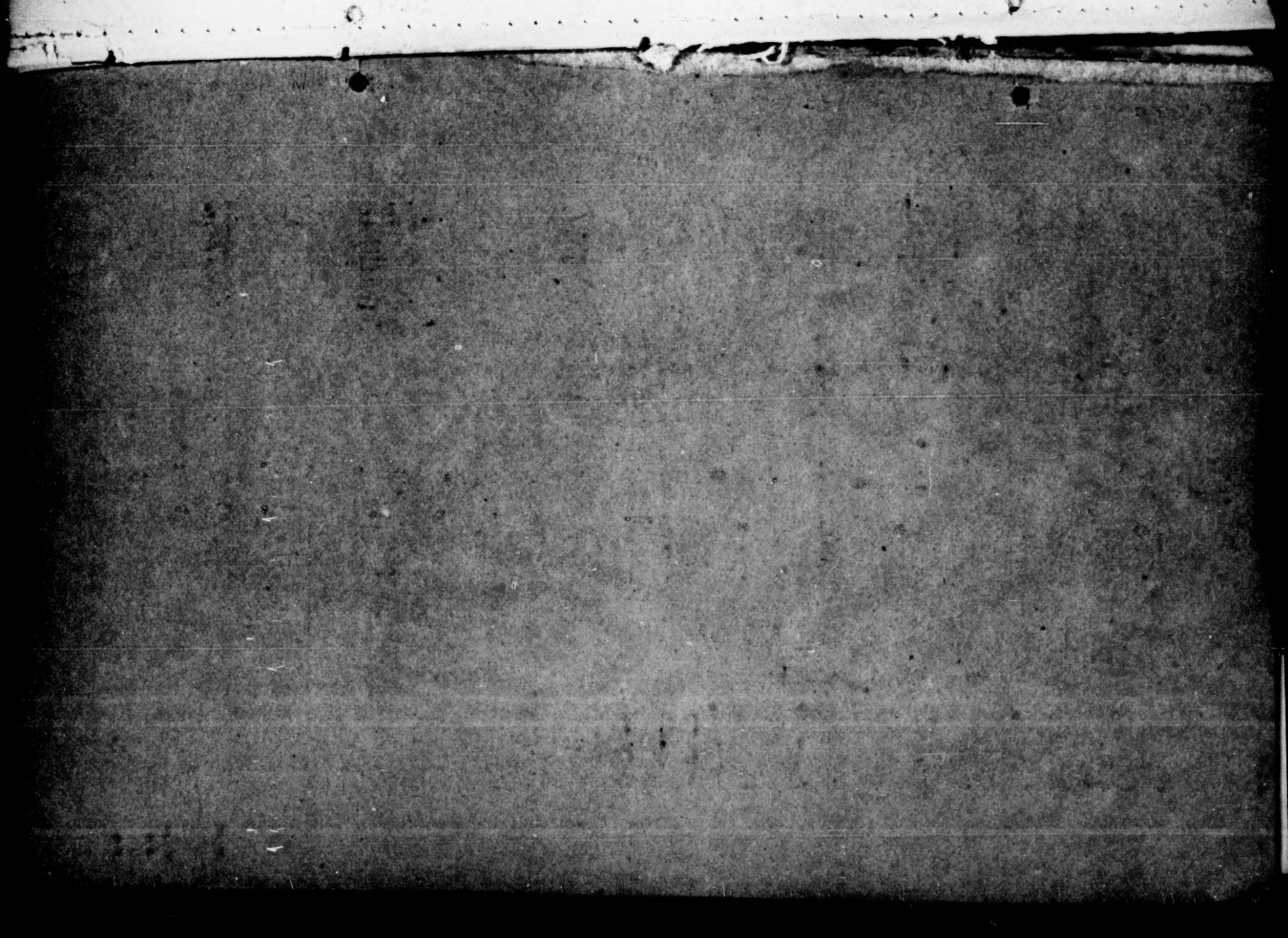
Jackson, Tennessee, this the fourth day of December, in the
35 year of our Lord one thousand eight hundred and seventy-five, and of the independence of the United States the one hundredth.

[SEAL.]

JOHN H. FREEMAN,
Clerk Supreme Court of Tennessee.
By L. D. HAYS, *Deputy Clerk.*

(Endorsed on cover:) Tennessee Sup. Court. No. 328. John Y. Keith, plaintiff in error, vs. E. A. Clark, collector of state and county revenue for Madison county. Filed 13 December, 1875.

IN THE



Robert Clarke & Co., Printers, Cincinnati, O. [*April*, 1878.

IN THE

SUPREME COURT OF THE UNITED STATES

John Y. Keith,
Plaintiff in Error,

vs.

E. A. Clark, Collector of State and County Revenue for Madison County, in the State of Tennessee.
Defendant in Error,

ERROR TO THE SUPREME COURT OF TENNESSEE.

ARGUMENT OF

GEORGE HOADLY, and
EDGAR M. JOHNSON,
Of Counsel for Plaintiff in Error.

STATEMENT OF THE CASE.

This cause comes into this Court, by writ of error to the Supreme Court of Tennessee.

The action was originally brought by John Y. Keith, before a justice of the peace, to recover the sum of forty dollars, by him paid, under protest, for taxes for the year 1874, to the defendant Clark, who was collector of State and county revenue for Madison county,

Tennessee. Judgment having been rendered, by the magistrate, for the defendant, an appeal was taken, in accordance with the laws of Tennessee, to the law side of the common law and chancery Court of the county of Madison, where the cause was tried to the Court and a jury, the defendant had a verdict and judgment (Record, 4, 5), and a motion for new trial, made by the plaintiff, having been overruled, a bill of exceptions was allowed, and made part of the record, which thus contains all the testimony and the charge of the Court (Ib. 6, 7). Upon appeal in the nature of a writ of error to the Supreme Court of Tennessee, this judgment was affirmed (Ib. 9).

The facts, as shown by the bill of exceptions, are, that Keith was a resident of Madison county, and was assessed in respect of his property there, for State taxes, for the year 1874, in the sum of $40.36; that on July 20, 1875, the defendant Clark, as collector, of State and county revenue, for said county, demanded payment of this sum, with $1.75 due thereon for interest, or $42.11, in all, whereupon Keith tendered to him

"in payment of said taxes, $2.15 United States legal tender currency and forty dollars in bills of the Bank of Tennessee, to wit, two bills, each of the amount of twenty dollars, one dated June 1, 1861, one June 1, 1854, each signed by G. C. Torbet as President of said Bank, and John A. Fisher as Cashier, and both having been issued by said bank subsequently to May 6, 1861, and being of what is known as the 'new issue' or 'Torbet issue' of said bank, and thereupon plaintiff claimed the right to pay taxes to defendant as such collector in said funds so tendered."

Clark refused to receive said tender and demanded the whole sum in legal tender currency, whereupon Keith protested that under the 12th section of the act of January 19, 1838, entitled "an act to establish a State bank, to raise a fund for internal improvement, and to aid in the establishment of a system of education," he was entitled to have said bills, together with said $2.15 in legal tender currency, received in payment of said taxes, but the collector, Clark, persisting in his demand, plaintiff paid him said entire sum of $42.11 in United States legal tender currency on July 20, 1875, and on July 23, 1875, being within thirty days from such payment, commenced this suit to recover said sum of forty dollars.

It was also shown that the defendant paid said sum into the State treasury, giving notice to the Comptroller at the time, that it had been paid by the plaintiff under protest.

The bills of the Bank of Tennessee, so tendered were produced in Court and again tendered to the defendant, who again refused them, but they were admitted to be genuine bills of said bank.

Section 12 of the charter of the Bank of Tennessee was given in evidence, also proof that at the time of the tender, such bills were worth, in the market, about twenty-five cents on the dollar. And this was all the evidence in the cause.

Thereupon the Court charged the jury as follows:

"That if the notes of the Bank of Tennessee, tendered by plaintiff to defendant as aforesaid were issued by the bank sub-

sequently to May 6, 1861, and during the existence of the State government established at that date in hostility to the government of the United States, then defendant was not legally bound to receive them in payment of plaintiff's State taxes. That while during said period the bills issued by the Bank of Tennessee, and the contracts made thereby with individuals were as against said bank valid and were entitled to be protected by the Constitution of the United States from subsequent State legislation impairing their obligation, yet section 12 of the charter of the bank could only have been operative upon the bills issued by the bank during said period through its re-enactment or tacit recognition by the then existing State government, and that this government had no power to commit the State to the contract expressed in section 12 for a longer period than the existence of the said government itself, and that consequently it was competent for the restored State government itself, in harmony with that of the United States, to refuse, by section 6, schedule to constitutional amendment of 1865, to abide by the contract of the insurrectionary State government in 1861, to receive said issues of said bank, in payment of taxes due the State, said contract not being entitled to the protection of the Constitution of the United States against repudiation at the hands of the restored State government."

To this ruling the plaintiff excepted, and afterwards also excepted to the action of the Court, in overruling his motion for new trial in said cause on account of such erroneous ruling of the Court.

ASSIGNMENT OF ERRORS.

The Supreme Court of Tennessee erred in affirming the judgment of the common law and chancery Court of Madison county.

There were two errors of law in the record, by reason of which this judgment ought to have been reversed; *first*, the charge of the Court was altogether erroneous, and *secondly*, the motion for new trial founded on this error was erroneously refused. As we are advised, a new trial in Tennessee, as in Ohio, is not addressed to the discretion of the Court, but is grantable of right, if any error, prejudicial to the defeated party, has interfered with his recovery, and to refuse such motion is error of law.

ARGUMENT.

It is not easy, without knowing more than this record discloses of the mental operations which resulted in the decision of the Supreme Court of Tennessee, affirming the judgment of the Madison County Common Law and Chancery Court, to argue this case at all. Every avenue of escape from reversal seems to have been closed to the defendant in error by the decisions of this Court, and of the Supreme Court of Tennessee in other cases.

In *Furman* v. *Nichol*, 8 Wallace, 44, this Court held that section 12 of the charter of the Bank of Tennessee, viz—

"That the bills or notes of said corporation, originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes and other moneys due the State"—

was a contract attaching to the notes issued before its repeal, which must be performed, although the section were repealed.

In *State of Tennessee, on the relation of Bloomstein*, v. *Sneed*, decided at the present term (October term, 1877), this Court decided that the action resorted to in the present case by Keith, was the proper and only remedy for the enforcement of this contract.

In the two opinions in the case of *State of Tennessee et al.* v. *Bank of Tennessee et al.*, published by way of appendix to the argument of R. McPhail Smith, Esq., in the case of *State* v. *Sneed*, in this Court, every other objection, which could be reasonably urged against the validity of the new issue Bank of Tennessee notes, was refuted and repelled by the Supreme Court of Tennessee. They were adjudged to be valid securities, not barred by the statute of limitations, and entitled to the same priority of payment, in the distribution of the assets of the bank, as notes issued before May 6, 1861.

In the case at bar, the opinion of the Supreme Court of Tennessee was delivered orally, and no written opinion or memorandum filed. (Ib. 9.)

We are left to grope in the dark for reasons why the bank notes issued after the beginning of the rebellion should not be received for taxes, unless the charge of the judge of the Madison County Court, or the opinion of the justice of the peace, may be considered as a substitute for light on the subject.

The charge of the judge in Madison county admits that the bills of the bank were valid, and entitled to be protected by the constitution of the United States, from subsequent State legislation impairing their obligation.

But their obligation, in part, consisted in the duty created by the contract of the State, in section 12, which, at the moment of their issue, attached to them, and, as this Court held in *Furman* v. *Nichol*, went with them everywhere, as long as they lasted, and although, after their issue, section 12 was repealed.

Section 12 was not repealed until 1866, while these notes were issued subsequently to May 6, 1861,

"during the existence of the State government established at that date, in hostility to the government of the United States."

And this contract of the State has been impaired by section 6, schedule to the constitutional amendment, adopted February 22, 1865, in the following words:

"All laws, ordinances, and resolutions of the usurped State government, passed on or after the 6th day of May, 1861, providing for the issuance of State bonds; also all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th day of May, 1861, and all debts created or contracted in the name of the State by said authority, are unconstitutional, null, and void;

and no Legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

Repeated decisions of this Court have established the legal validity of promises like these, made during the rebellion.

In *Texas* v. *White*, 7 Wallace, 700, the distinction was made between acts of a State government, in the exercise of the ordinary powers of the State, for the preservation of peace and good order, and the just rights of citizens, and acts in hostility to the United States, or in subversion of the just rights of citizens.

In *Horn* v. *Lockhart et al.*, 17 Wallace, 570, affirming same case reported in 1 Woods, 628, 636, it was held that:

"The acts of the several States, in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding."

See also—

Sprott v. *United States*, 20 Wallace, 459.

United States v. *Insurance Cos.*, 22 Wallace, 99.

This case differs from *Taylor* v. *Thomas*, 22 Wallace, 479, in this—that there the "cotton money" was

"issued in aid of the rebellion, and was therefore void;"

whereas, here, there is no pretence that the notes were not issued in the ordinary and regular course of bank-

ing business. The Bank of Tennessee, though its entire capital stock was owned by the State, was

"a distinct fiscal corporation, enjoying a separate existence, with its own chartered rights, obligations, and powers,"

and not, in any sense, legal or practical,

"identical with, or even an integral part of, the State sovereignty."

Bank of Tennessee v. *Dibrell*, 3 Sneed, 379.

Whether the offer of the loyal State of Tennessee, made in 1838, to receive, in payment of taxes, the notes which might be issued by the Bank of Tennessee, or its branches, might have been affected by legislation of the rebels, who had possession of the State, at any time between 1861 and 1865, need not be considered. There was no such legislation. The idea of the Court below seems to have been that the rebellion, *ipso facto*, extinguished the loyal State, just as death puts an end to the life of the citizen; and that the contract could only have a sort of *post mortem* vitality, by its adoption or tacit recognition by the executor *de son tort*, the rebel State government, *de facto* in possession of power.

"Section 12 of the charter of the bank could only have been operative upon the bills issued by the bank during said period, through its re-enactment or tacit recognition by the then existing State government,"

says the Court below, as one of the reasons for holding the legislation of 1865 constitutional. This is simply absurd. The State of Tennessee did not depart this

life when the rebellion broke out. It continued to employ its agencies of government for the beneficent ends fully described in *Texas* v. *White* and *Horn* v. *Lockhart*. What though it mingled with its lawful purposes the dark and sinister design of

"impairing the supremacy of the national authority, or the just rights of citizens under the constitution,"

the legal inefficacy of the latter does not taint the former. It is clear, therefore, that the section 12 did not, during the war, depend upon any action, or implication from the action, of the State, after the beginning of the rebellion. There was no such action, in point of fact, and, in law, it depended on the offer of the State, made in 1838, and not withdrawn. The judgment below can only be sustained by holding that the secession of Tennessee had the effect, in law, of withdrawing all lawful outstanding offers and propositions made by the State.

Having made this first false assumption, the Court below proceed to a second, viz., that the rebel State government had

"no power to commit the State to the contract expressed in section 12 for a longer period than the existence of the said government itself."

In other words, the man died, and that put an end to his contracts. During his decease, they were only binding on his executor *de son tort*, by force of *his* recognition, express or implied. When the dead man came to life, it was by birth *de novo*, as it were; so that

his contracts and liabilities did not revive with him. They had capacity, which he had not, to stay dead.

Or perhaps the idea of the Court below may be better expressed by another figure. The State was under duress, and the legal validity of an acceptance, during the time of imprisonment, of its offer made when free, according to the judge, depends on the consent, express or implied, of the jailer! When released, the prisoner is at liberty to repudiate the contract.

It is evident that the courts of Tennessee act upon a false conception of the contracts made under the law of 1838. Instead of considering the offer of 1838 as continuous, and depending for its validity on the legal capacity of the General Assembly of 1838 to enact it, they treat each bill as evidence of a new offer by the State, and acceptance by the holder. Thus, in *Furman* v. *Nichol*, they contended that, upon the occasion of each transfer of a Bank of Tennessee note, there was a "proposition repeated" by the State to the new holders, which, if accepted after the repeal of section 12, could not impart to the bill in his hands, the rights conferred by that section upon his vendor. And now they claim that the rebel State government was a nullity, and that as bills were issued after the loyal government was subverted, the propositions to the respective holders came only from the insurrectionary government, and were subject to repudiation by its loyal successor.

This Court repelled this notion in *Furman* v. *Nichol.*

If the rebel State government had established a bank

for ordinary fiscal business, with section 12 incorporated into its charter, the victory of the Union would not have punished the bill holders by extinguishing the rights thus acquired. *United States* v. *Insurance Companies*, 22 Wall. 99.

A fortiori, the promise, made in 1838, survived the rebellion, unaffected by its untimely birth or timely death. It did not derive any vitality from its baleful existence, as the Court below seem to imagine, or depart this life when the war ended.

These are the reasons given by the learned judge of the common law and chancery Court of Madison county, for holding that

"consequently it was competent for the restored State government in harmony with that of the United States, to refuse, by section 6, schedule to constitutional amendment of 1865, to abide by the contract of the insurrectionary State government in 1861, to receive said issues of said bank in payment of taxes due the State, said contract not being entitled to the protection of the Constitution of the United States against repudiation at the hands of the restored State government."

This is really the only proposition made in the charge, all the rest being merely ratiocination leading to this. It is false in fact and false in law. There was no such contract of the insurrectionary State government: —had there been, it would have been valid, not being in hostility to the lawful supremacy of the United States, or in derogation of the just rights of any citizen. The contract consisted of an offer, continuous in character, first made in 1838, not withdrawn till 1865,

and which became completed as a contract by the acceptance of each bill holder, when the bank or any of its branches paid the note to him. This being a lawful offer, made by a *de jure* State, continues in operation, although the powers of that State may have been temporarily usurped by insurgents. Otherwise rebellion and violence have the effect to deprive law of its rightful as well as its actual power, to convert it into illegality, so that it ceases to operate when order is restored. And such is the contention of the Court below.

The judgment of the Court having been thus shown to have been based on a law raising a federal question, and the attempt to support such law not having good and valid grounds, must be reversed. *Klinger* v. *State of Missouri*, 13 Wall. 257, 263.

Respectfully submitted,

GEO. HOADLY,
EDGAR M. JOHNSON,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

JOHN G. KEITH,
Plaintiff in Error,

vs.

E. A. CLARK, *Collector,*
Defendant in Error.

No. 67.

P. PHILLIPS
AND R. Mc. P. SMITH,
Counsel of Plaintiff in Error.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

JOHN G. KEITH,
Plaintiff in Error,

vs.

E. A. CLARK, *Collector*,
Defendant in Error.

No. 67.

Brief of P. PHILLIPS and R. Mc. P. SMITH,
Counsel of Plaintiff in Error.

Statement.

Section 12 of the charter of the Bank of Tennessee, enacted January 19, 1838, (Statutes of Tennessee—Nicholson's Supplement, p. 26,) is as follows:

"*Be it enacted*, That the bills or notes of the said corporation originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State." *Folio* 20.

Plaintiff, a tax-payer of Madison county, claiming the right under this section to pay his State taxes for 1874, in what is properly known as the new issue of

this bank—its bills issued after May 6, 1861—tendered to the collector the amount of these taxes, $40 in such bills and $2.15 in legal-tender currency. The collector refused the tender and demanded payment of the whole amount in legal-tender currency.

Folio 18.

Section 2 of an act of the Legislature of Tennessee, approved March 21, 1873, (acts of Tennessee, 1873, p. 72,) having taken away every other remedy, plaintiff thereupon resorted to that provided thereby, viz: having, under protest, paid the taxes in the funds exacted, he then, within thirty days thereafter, brought suit against the collector, before a justice of the peace, to recover the money. The act provides that if judgment on the merits be obtained in such a case, the comptroller shall issue his warrant for the amount thereof, which shall be a preferred claim upon the treasury.

Being unsuccessful before the justice, plaintiff appealed; and being again unsuccessful, he took an appeal in the nature of a writ of error to the Supreme Court of Tennessee which affirmed the judgment of the lower court; thereupon the case was brought here by writ of error.

The Supreme Court delivered its opinion orally, and no written memorandum of it was filed. *Folio* 28. The judgment of affirmance was in the invariable form of such judgments. So that recourse must be had to the bill of exceptions to ascertain what was drawn in question and how decided.

Folio 17.

Assignment of Errors.

The lower court, in its charge to the jury, put the case upon one point: that the State's obligation to receive the bills of the bank for taxes had, as to those issued after May, 6, 1861, been validly repudiated by section 6, schedule to the State constitutional amendments of 1865. The reasoning in support of this view was, that section 12 of the bank charter could have been operative after May 6, 1861, (the date of the so-called declaration of independence of Tennessee,) only by virtue of a re-enactment or tacit recognition of the section by the rebel State government; and that the State's contract to receive the new issue of the bank for taxes being thus the act of the rebel State government, was not entitled to the protection of the constitution of the United States against repudiation at the hands of the loyal State in 1865.

The charge of the lower court, which was sustained by the supreme court, may be more formally stated thus:

The loyal State in 1865 had the right to repudiate the contracts of the rebel State after May 6, 1861.

The obligation of the State to receive the new issue for taxes, rests upon a contract made by the rebel State by the re-enactment or tacit recognition of section 12 of the bank charter.

Therefore, section 6 of the schedule to the constitutional amendments of 1865 was a valid repudiation of the State's obligation to the new issue.

Whether this be regarded as three rulings, or as one, we assign all of it as error.

Points of Law.

The State supreme court not seeing fit to deliver a written opinion, or to do more than dryly to affirm the judgment of the lower court, recourse must be had to the bill of exceptions to ascertain what was drawn in question and decided. *Armstrong* vs. *Treasurer*, 16 Peters, 281; *Medbury* vs. *Ohio*, 24 How., 413; *Murdock* vs. *Memphis*, 20 Wal., 634. Indeed, until the change in the practice following the last-mentioned decision, before which the opinion of the State supreme court was but little regarded, the bill of exceptions in cases at law determined the jurisdictional question. And even after intimating in the last-mentioned case that thenceforth the opinion would be looked to, the Court nevertheless added on page 634, "But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry."

But these remarks are superfluous in so palpable a case as the present.

Section 6, schedule to the State constitutional amendments of 1865 (Laws of Tennessee, 1865, p. v,) is as follows:

"All laws, ordinances, and resolutions of the usurped State government, passed on or after May 6, 1861, providing for the issuance of State bonds, also all notes of the Bank of Tennessee or any of its branches, issued on or after the 6th day of May, 1861, and all debts created or contracted in the name of the State by said authority,

are unconstitutional, null, and void; and no legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

The lower court in its charge conceded that this ordinance was powerless to compass what was its primary aim as to the new issue—to extinguish it altogether; saying that during the period in question "the bills issued by the Bank of Tennessee, and the contracts made thereby with individuals were *as against said bank* valid, and were entitled to be protected by the Constitution of the United States from subsequent State legislation impairing their obligation." Then follows the remarkable ruling as to section 12 of the charter, which obligated the State to receive for taxes all valid issues of the bank.

Every bill of this bank was the vehicle of two undertakings. On its face the bank promised to pay the bearer so many dollars. On its back the State promised to receive it at par in payment of taxes. For this contract may be regarded as virtually endorsed on every note. *Furman* vs. *Nichol*, 8 Wal., 61. Section 6 of the schedule sought to repudiate *both* promises. The Court held that the bank's promise, on the face of the note, was under the protection of section 10, article I of the Constitution of the United States; but that the State's promise, on the back of the note, was not, and was therefore exposed to repudiation at the hands of the schedule.

To justify this, it was held that the State's promise, on the back of the notes in question, was the act of the rebel State after May 6, 1861.

But clearly it was not. There was no re-enactment of section 12 of the charter by the rebel State legislature. If there had been, this would have been merely superfluous, and the section would have stood on its original enactment in 1838. And as to the "tacit recognition" of the section by the rebel State legislature, the only evidence that they recognized it is that they did not repeal it; and if this made the section stand on their authority during the rebellion, by parity of reasoning all the other sections of the charter, and all other unrepealed statutes of the State, and, indeed, the entire jurisprudence of the State, in so far as alterable by them and yet left unaltered, must be considered as having rested exclusively upon the same authority.

The State's contract as to the bills of this bank was made in 1838. She *then* agreed to receive for taxes all the bills that might be thereafter validly issued by the bank. It was as if she had then given the bank a power of attorney to endorse receivability for taxes upon its future issues. In the language of this Court in *Furman* vs. *Nichol*, 8 Wal., on page 60: "Until the legislature in some way notifies the public that the guaranty thus furnished has been withdrawn, such a contract is binding on the State, and within the protection of the Constitution of the United States."

The point is, that the State's obligation to receive a bill of the bank for taxes did not rest upon any act of the State contemporaneous with the issuance of the bill, but upon the original enactment of section

12 of the charter in 1838, which simply *staid* in force, the same as if there had been no rebellion—this by force of its original enactment in 1838.

But, for the sake of argument, suppose we concede the queer position sustained by the State supreme court, that upon the rebellion section 12 of the bank charter dropped out, and being then re-enacted or tacitly recognized by the rebel legislature, was thereafter operative on the issues of the bank by force of this re-enactment or recognition. What then? It follows that the obligation of the State to receive for taxes the notes in controversy was the act of the rebel State. And what then?

In *Huntington* vs. *Texas*, 16 Wal., 413, it was held that the rebel State government had power to aliene for legitimate purposes the property of the State.

In *Horn* vs. *Lockart*, 17 Wal., 517, it was held that the acts of the States during the rebellion, and of their different departments of government, legislative, executive, and judicial, so far as they did not tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, were valid and binding.

"It is only," said the Court, in *Sprott* vs. *The United States*, 20 Wal., 464, "when in the use of these powers substantial aid and comfort was given, or intended to be given, to the rebellion; when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void."

This was repeated in *The United States* vs. *Insurance Companies*, 22 Wal., 102.

In *Richmond* vs. *Smith*, 15 Wal., 429, the loyal city government was held liable for the tort of the rebel city government. If a rebel city government could entail a *tort* upon its loyal successor, surely a rebel State government might entail an innocent contract.

So that the singular premise assumed has not even the merit of yielding the desired conclusion; since even if section 12 of the bank charter had to stand as to the new issue upon the footing of a re-enactment or recognition by the rebel State government, yet, unless this action was tainted with treason—of which there is no pretense—the obligation thus assumed by the State was as valid and binding, and as well entitled to the protection of the Constitution of the United States as if there had been no rebellion.

The attempt of the State court here was the common one in cases where it is sought to give force to legislation impairing the obligation of contracts, viz: to metamorphose the contract sought to be violated into a shape incapable of presenting any obstruction to the offending act. Thus, in *Jefferson Branch Bank* vs. *Skelly*, 1 Black., 436, as in other previous cases, the State of Ohio having adopted a new constitution overriding a previous contract as to taxation, it was held, not squarely, that the new constitution might override the contract, but that the contract was not a contract. So in *Furman* vs. *Nichol*, 8 Wal., 44, the

State court did not affirm that the repeal in 1865, of section 12 of the charter of the Bank of Tennessee had power to relieve the State of her contract therein contained, as against parties entitled to the benefit of the contract. It was, however, sought to give practical effect to the repeal by limiting the benefit of the contract, which ran with the notes to holders of the notes who had become such before the repeal. The ingenuity of the court was exercised upon the contract, not upon the legislation.

In the present case the attempt was to turn the State's contract, as to the new issue, into a sort of *caput lupinum*, which the loyal State might knock in the head at pleasure. It was supposed that if it were converted into the act of the rebel legislature, this court would not extend to it the protection of the Constitution of the United States, but would allow it to be despatched by section 6 of the schedule to the State constitutional amendment of 1865.

In *State* vs. *Stoll*, 17, Wal., 425, was involved the same point as here. Section 16 of the South Carolina Bank was identical with section 12 of the charter of the Bank of Tennessee, p. 426; and the notes therein questioned were issued after the State had plunged into the rebellion. Page 429, at bottom.

It might as well have been argued there as here, that the reconstructed State government was not bound to receive for taxes the notes of the State bank issued during the rebellion, because section 16 could have been operative then only through a re-

enactment or recognition of the rebel State government, which could not bind the State by a contract entitled to the protection of the Constitution of the United States.

Such a point, if a point, could not have escaped the notice of the counsel of the State, and of the State Supreme Court; and if it had, still, had there been anything in it, this court would, in a case of that importance, have noticed it under the last clause of rule 21, § 8, even if not assigned.

The case, briefly summarized, is this:

The State in 1838 bound itself by contract to receive the notes of the bank in payment for taxes.

It undertook in 1865 to render null and void the notes of the bank issued in 1861.

When the plaintiff in error offered to pay his taxes in these notes, the courts of the State gave effect to the act of 1865, denied the right set up, and thus not only impaired the obligation of the contract, but annulled it.

The right to enforce this contract by the holder of these notes, was presented to this court, and considered at the last term. The proceedings was by mandamus against the tax collector.

The contention on behalf of the State was that such a proceeding was virtually a suit against the State, and that the legislature had prohibited such suits prior to the commencement of this action.

On the other side, it was maintained that the mandamus was the remedy when the contract was entered

into; and that it was so connected with the contract itself as to be protected by the Federal guarantee against State interference.

It was, however, held by the court that the holder of these notes had no just ground of complaint, inasmuch as the State had provided by the act of 1873, "*a speedy and effective remedy to enforce the claim set up by him.*"

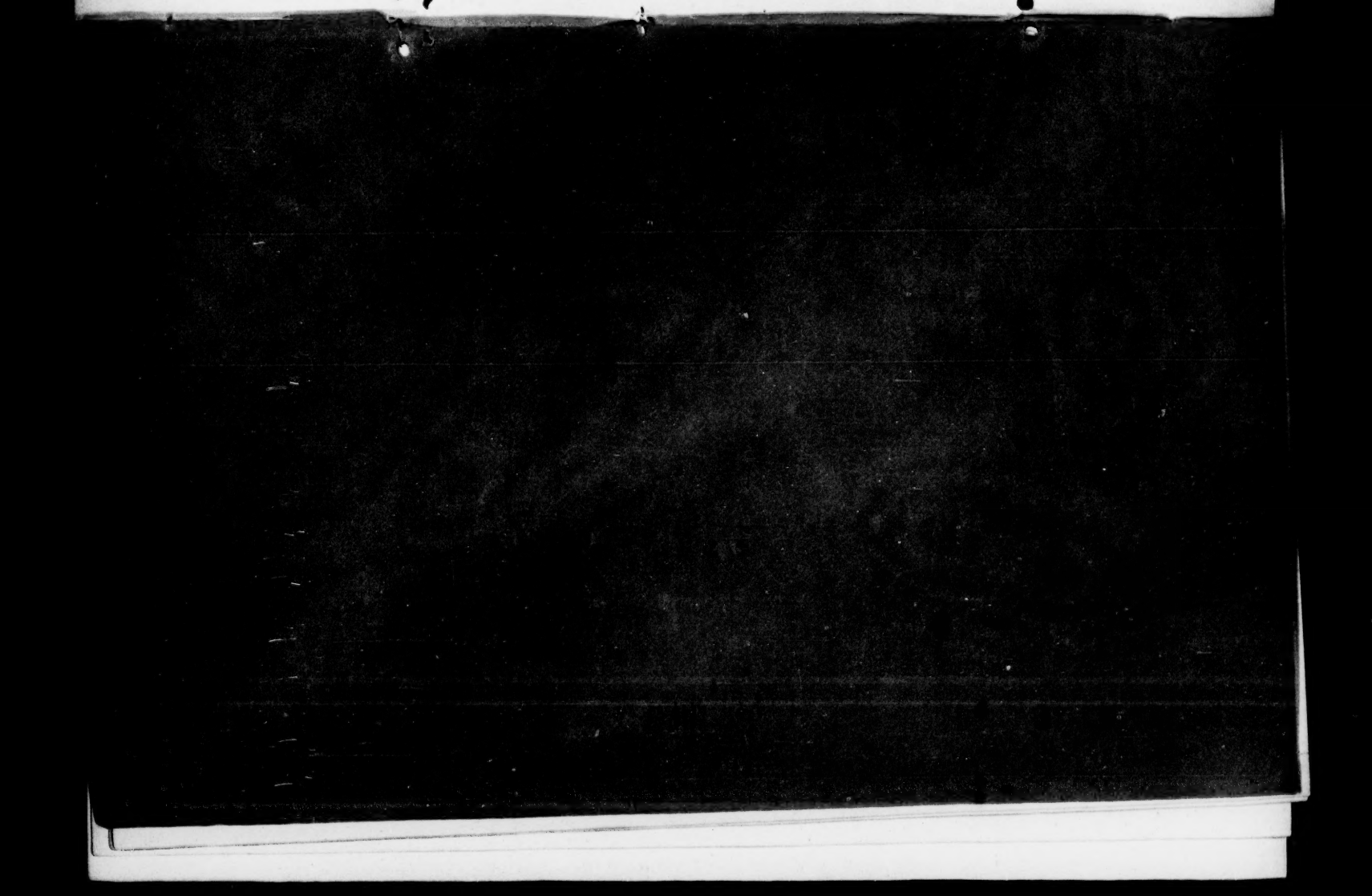
Tennessee vs. *Sneed*, 96 U. S., 69.

The case now before the court seeks the enforcement of the contract under the act referred to in this decision.

The Record shows that, in the State supreme court there was drawn in question the validity of section 6 of the schedule to the State constitutional amendments of 1865, on the ground of its being repugnant to section 10, article 1, of the Constitution of the United States as to the effect sought to be given it upon the State's contract as to the new issue of the Bank of Tennessee, contained in section 12 of the charter; and the decision was in favor of its validity.

This section, we submit, was a violation of the contract made by the State, and the decision which gave effect to it must be reversed.

P. PHILLIPS
AND R. MC. P SMITH,
Counsel of Plaintiff in Error.



In the Supreme Court United States.

OCTOBER TERM, 1878.

KEITH vs. CLARK.—No. 67.

MOTION TO DISMISS.

In this cause, on the twelfth day of October, I notified, by mail, the counsel in this cause, Mr. R. McPhail Smith, that I would move this court to dismiss this cause, for want of jurisdiction, on Tuesday, the 5th of November, 1878. This notice was mailed at Knoxville, Tennessee, directed to the counsel at Nashville, and post-paid. On the same day, and at the same time, a copy of my brief was sent by mail to the counsel, properly addressed and post-paid. I had, a week previously, written to Mr. Smith, requesting him to accept notice for the first motion-day in term, and on the next Monday thereafter had mailed to him a proof of the brief, properly directed and post-paid. This was declined when the time had almost expired, and the formal notice given as above stated. Then, after nearly two weeks of the three had expired, I was notified by Mr. Smith that the submission of the motion would be opposed, on the ground that it was given for a day which was not a motion-day.

Motion-days are appointed for the convenience of the court, to avoid the interruption of the regular business of the court by the making and hearing of motions on other days, to the obstruction of the regular business; but printed motions are frequently handed in on other days.

The object of the rule as to notice is to give the counsel the three weeks' opportunity for preparation to meet the

motion to dismiss, and prepare an answer to the brief of counsel for the motion. To give them this opportunity, it is not material that the time should expire on a motion-day; but the purpose of the rule is equally preserved and carried out whatever the day fixed may be.

If the motion was one to be orally argued, the policy of the court would be preserved and carried out by allowing the motion to be entered, and passing it to the next motion-day to hear the argument. If, as in this case, the motion is one to be submitted on briefs, then the policy of the rule is fully preserved by allowing the briefs to be submitted at the day fixed, though not a motion-day.

The time in this case was delayed one day, on account of a temporary derangement of the mails and a doubt whether on that account the notice and briefs could be received so as to give the full three weeks required by the rule, if Monday was the day fixed.

Previous to the notice, probably the preceding Tuesday, the proper number of copies of the brief were mailed at Knoxville, directed to the clerk at this place, and post-paid.

It is now objected to the hearing of this motion, that the main case will come on in a few days. That may or may not be so. The motion is in furtherance of the business of the court. It presents a question simple and isolated, which must be determined, and which evidently must dispose of this case; and if so, it is useless, and a waste of time and labor, both of court in hearing and counsel in preparing and presenting the merits of a controversy involving many difficult questions.

If the court think, on the examination of this motion, that the objection to the jurisdiction is not likely to prevail, they can hear the main case when reached. Otherwise, and this hardly admits of a doubt, they can end the case on this motion.

The brief filed by plaintiff on the principal case makes

a point on the jurisdiction not anticipated in defendant's brief. It insists, that as the bill of exceptions shows that a Federal question was decided in the Circuit Court of the State of Tennessee, that from this alone it will be inferred that the Federal question was decided in the Supreme Court of Tennessee. The defendant's brief cites, but does not call special attention to the case of The Insurance Co. *v.* The Treasurer, 11 Wall., 204, which settles the point that it must appear that the Federal question was raised and decided in the *highest court*, and that the fact of it being raised and decided in the inferior court will not do; nor will the fact of a general affirmance support an inference that a Federal question so determined below was determined at all above.

B. J. LEA, *Attorney-General,*
For the State of Tennessee.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

KEITH
vs.
CLARK.

Motion to Dismiss.

No. 67.

BRIEF OF B. J. LEA, Attorney-Gen'l for Tennessee.

On behalf of the defendant in error, we move dismiss this case for want of jurisdiction, on the ground that it does not appear in the record that the Supreme Court of Tennessee decided any question in the case involving the Constitution or laws of the United States, but that for all that does appear that court may have decided and probably did decide the case upon the ground that the Act of 1873, c 44, under which the suit is brought did not authorize the proceeding, and that the Circuit Court and the Justice before whom it originated had no jurisdiction of the cause. If it were placed on this ground, and so far as the record goes *non constat* that it was not; to use the words of this court in the case of the Insurance Co. vs. The Treasurer, 11 Wall., 208, that would have been a decision of the case upon a construction of the State Act. * * * In this case it does not appear what construction was given to the State Statute. All that can certainly be gathered from the record is that the plaintiff in the opinion of the Supreme Court of Tennessee could maintain no action for the cause set out in the record.

The suit is brought before a Justice of the Peace by a tax-payer to recover from a tax collector certain monies which the tax collector alleges were due to the State, and were paid by him in cash after he had first tendered the amount in what is called in Tennessee *new issue* of the Bank of Tennessee—being notes of the bank issued during the war, which notes the State Government has instructed her officers not to take. The plaintiff insists that notwithstanding the revenue regulation the State is bound to take the new issue, and that the officer having refused to accept it in payment, this suit lay against him to recover the money paid. The State insists that the act under which this suit was brought makes no provision for any such case, and that as the Supreme Court of Tennessee gave no written opinion, and as the record does not show the ground of the decision, it does not appear that they ever reached the Federal question upon which the jurisdiction of this court depends.

It seems a work of supererogation to recount the numerous decisions of this court upon this question of jurisdiction, but to give counsel notice of the state of the question it is perhaps proper to cite the cases.

To enable the Supreme Court to take jurisdiction under section 25 of the Judiciary Act of a case brought from a State Court *the record must show* that some of the matters mentioned in that section *was necessarily* decided by the court, and that the judgment would not have been rendered without such decision. If it might have been decided on some other ground the court has no jurisdiction. Railroad Company vs. Rock., 4 Wall., 177. *And it must affirmatively appear.* Steines vs. Franklin county, 14 Wall., 15; Kennebeck Railroad vs. Portland, Id. 23, Cockroft vs. Vose, 14 Wall., 5, Hurley vs. State, Id. 85, Caperton vs. Boyer, Id. 216, Delmas vs. Ins. Co., Id. 661, Smith vs. Adsit, 16 Wall. And clearly, Klinger vs. State, 13 Wall. 257.

The Supreme Court can not review the decision of a State court *where it does not appear* from the record that the de-

cision of the State court *must* have depended upon the construction of the Constitution or some law of the United States. Carter vs. Bennett, 15 How., 354.

It is not sufficient that a question under the Constitution was involved. Such question *must appear* to have been actually and distinctly raised and to have been decided in the State court adversely to the plaintiff in error. Farney vs. Towle, 1 Black., 350, Hoyt vs. Sheldon, 1 Black., 518.

It must appear that the point was raised and decided in the State Court: that the attention of the Court was called to the particular clause of the Constitution of the United States on which the party relied and to the right he claimed under it and that with the question thus distinctly presented the decision was against him. Farney vs. Towle, 1 Bl., 350.

Although the decision may have involved the validity of a State law impeached as impairing the obligation of a contract, jurisdiction will not accrue if upon the whole case the decision of the State Court would have been the same had there been no such law. Williams vs. Oliver, 12 How., 111, 16, 125. This court will not reverse case and send it back to be decided the same way on the other ground. Ib.

If the case is such that the court might have decided without passing on a Federal question, this court has no jurisdiction under the Judiciary Act. Mills vs. Brown, 16 Pet., 525. Railroad Co. vs. Rock., 4 Wall., 177.

And a waiver of the objection will not justify the court in expressing an opinion on the merits of a case of which it has no jurisdiction. Miller vs. Brown 16 Pet.,, 525.

Where the record does not clearly show on which of two grounds the judgment was based, then if the independent ground on which it was based was a good and valid one sufficient of itself to sustain the judgment, the court will not assume jurisdiction. Klinger vs. Missouri, 13 Wall,

257. If it was not good and valid this court will not presume that it based its judgment upon it.

Where it is not possible to discover any other ground of decision but one involving a Federal question, the jurisdiction will be sustained. Dooley vs. Smith, 13 Wall., 604, Armstrong vs. Athens Co., 16 Pet., 281.

And see Crowell vs. Randall, 10 Peters., 368, citing and reviewing all the previous cases. It is there held that to sustain the jurisdiction under the 25th section of the Judiciary Act it must appear,

1st, That some one of the questions stated in the section *did arise* in the State court.

2d, That the question was decided as required by the act.

3d, It is sufficient if it appear by *necessary* intendment, that it must have been raised and decided.

4, It is not sufficient that it might have arisen and been applicable. It must appear that it did arise and was applied.

The authorities then establish that it must clearly and affirmatively appear that a Federal question was decided. It will not do to show that it was involved in the case, but it must be shown that it was involved and decided. If it appears that the case *might* have been decided on another point, which was involved in the cause, then the jurisdiction of this court fails.

Now this record does not show that any Federal question was decided by the Supreme Court of Tennessee. On the contrary it shows that the court could have decided the case upon either of two questions, equally decisive of it, and does not show which of them was in fact decided.

Indeed it does more than this. It shows that one of these, the non-Federal question, was a question of jurisdiction, upon which it was the duty of the court to pronounce in the first instance, and upon their so pronouncing, the case would be decided for the defendant, and so if it was necessary for

the objection to the jurisdiction to be supported by a *prima facie* case, the objection would have to prevail. But as the contrary fact must be made to appear to give this court jurisdiction, and as the failure to make it appear defeats the jurisdiction, this perhaps is not very material; it is nevertheless true, that *prima facie* the case was decided upon the non-Federal question, when it is enough that it does not clearly appear to be the other way.

In the case of Insurance Company vs. the Treasurer, 11 Wall., 204, where the Supreme Court of New York decided on a Federal question, but it did not appear upon what the Court of Appeals decided, but they might have decided upon a State statute, this court held that the jurisdiction did not appear.

But, it may be said that this court is of opinion that the law does give the jurisdiction to the State court. In the case of Bloomstein vs. Sneed, that question was not discussed by the then Attorney-General, and upon looking to his briefs in that case I discover that he declines to discuss or rely upon that question, and insists upon the decision upon other grounds. But whatever may be the opinion of this Court, it is a Tennessee statute, and the jurisdiction of a Tennessee Court, that is involved in this case, and upon such a question, the law of this court, is that the decision of the Tennessee Court is decisive.

The Supreme Court of Tennessee on that very case of Bloomstein vs. Sneed decided that the act of 1873, does not give them jurisdiction of a case such as this, and they hold that the State had the right to take away a remedy against herself though she gave no other remedy in lieu. This court may think that such a decision is not supported in reason, but that is not the question here. Here the question is, what is the opinion of the courts of Tennessee upon the subject? What is the law of Tennessee on that point is settled finally

by their opinion. What is the law on the Federal question is settled by the opinion of this court.

I might even go further than this, and insist that where the question is upon what point the courts of Tennessee decided a case it might properly be inferred from the opinion of that court pronounced cotemporaneously that they decided a particular way, though that opinion was clearly wrong and upon a question on which that opinion was not a conclusive authority. When you know that the courts of Tennessee in January, 1876, held that the act of 1873, c 44, provided no remedy for the holder of Tennessee bank notes, you can not say that it *appears* that they *did not* decide this case in June, 1876, on that ground; and it must appear that they did not decide it upon that ground, but upon another and different ground, or the jurisdiction fails. But when their decision is conclusive of the question, the case here is brought into the very category to which this court has so often declared their appellate jurisdiction did not reach.

Has the court of Tennessee so decided? I extract from their opinion in the Bloomstein case:

"By chap. 44 of the Acts of 1878 it was enacted that whenever any tax-payer conceives that the taxes demanded of him are unjust or illegally demanded, his only remedy is to pay the taxes under protest and afterwards sue the Collector, and no officer of the State is to be subjected to any suit for a refusal on his part to accept, in payment of revenue to the State, any kind or description of funds or securities or papers other than such as he may be authorized and required to receive for the time being by law."

By chap. 115 of the Acts of 1873, it is provided that "Tax Collectors shall receive, in discharge of the taxes and other dues to the State, bank notes of the Bank of Tennessee, known as old issue, warrants on the Treasury legally out-

standing, gold, silver, National bank notes, United States legal tender notes and nothing else."

It is manifest that if these provisions of the statutes are valid the common law court had no jurisdiction to entertain the application for a mandamus. The prohibition *is explicit* against the receipt of the notes in controversy by the Tax Collectors and against the power or jurisdiction of any court in the State to entertain a suit against such Tax Collector for refusing to receive the *new issue* for taxes due the State."

It is insisted for the petitioner that these provisions of the statutes impair the obligation of the contract of guaranty," &c. The Legislature "has forbidden its officers to recieve the new issue in payment of taxes, and has withheld from the courts *any jurisdiction* to entertain a suit for refusal to receive such payment."

In the case of Walters vs. Morrow, newspaper Rep., Knoxville, 1874, McFarland Judge, says of the act of 1873: "this act denies to the courts all jurisdiction of suits against the State or against any officer of the State acting by authority of the State with a view to reach the State, its treasury funds or property.

These cases show clearly the view of the courts of Tennessee as to the proper construction of that act, and it is to this view that we must look when we are to say that they *must* have decided this case upon a Federal question and *could not* have decided it upon the want of jurisdiction of the Circuit Court.

As I said before, this court is not now called upon even to construe that statute. If they are not satisfied that this case must have been decided upon a question affecting the validity or obligation of the contract—they must say *non-constat*, that this court has any jurisdiction.

But the act itself is too plain to admit of any doubt. I here insert it in full:

SECTION 1. *Be it enacted by the General Assembly*

of the State of Tennessee, That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding, or take any steps for the collection of the same alleged, or claimed to be due by said officer, from any citizens, the party against whom the proceeding, or step, is taken shall, if he conceives the same to be unjust, or illegal, or against any statute, or clause of the Constitution of the State, pay the same under protest, and upon his making such payment the officer or Collector shall pay such revenue into the State Treasury, giving notice at the time of payment to the Comptroller, that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof, and the same may be tried in any Court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected as not being due from the said party, to the State for any reason going to the merits of the same, then the Court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the Treasury.

SEC. 2. *Be it further enacted*, That there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other, or different funds, than such as the tax-payer may tender, or claim the right to pay, than that above provided, and no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in anywise issue either injunction, supersedeas, prohibition, or any other writ, or process whatever, but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully, or illegally

collected, the remedy for said party shall be as above provided, and in no other manner.

SEC. 3. *Be it further enacted*, That in all such cases, if the Court shall certify of record in the cause, that it appears from the evidence before the Court that the officer against whom said suit is brought has acted in good faith, and has defended said suit with proper diligence, and care, the necessary cost of said cause shall be taxed, as now provided by law in criminal causes, and be paid by the State.

SEC. 4. *Be it further enacted*, That in all cases where suits, or actions of any kind, are brought against any person charged by law with the collection of revenue, for the recovery of the tax paid, as hereinbefore provided, it shall be the duty of the District Attorney General for the District, or Circuit, in which the suit shall be brought to attend to the same, and conduct the defense thereof. And in the event the defense is successfully made, the said Attorney General shall be entitled to a tax fee of ten dollars ($10) to be taxed to, and be paid by the party having brought the action against said officer, but if the Court hearing the cause shall be of opinion, and so determine, and adjudge, that the act of the officer was not in good faith, or shall fail to certify, the officer shall pay costs, and shall also pay a tax fee of ten dollars to the Attorney General.

SEC. 5. *Be it further enacted*, That nothing in this Act shall be so construed, or have the effect to subject any officer of the State to any suit for a refusal on his part to accept in payment of revenue to the State, any kind or description of funds, or securities, or papers, other than such as he may be authorized and required to receive for the time being by law.

SEC. 3. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

It is to be observed that this act confers a remedy in a case wherein none before existed, the Supreme Court of Tennessee having uniformly held, in conformity with the

current of legal decision, that taxes paid could not be recovered back. As it does not take away this form of action from this class, but merely fails to confer it in this form on this class, it is subject to no exception, as impairing the obligation of contracts. If the act in other features antagonizes the constitutional provision it can not for that cause be held to confer a jurisdiction, which it expressly withholds. An act may be invalid because it infringes a constitutional provision, but its unvalidity can only operate to preserve existing rights, not to confer rights not before existing. This Court might possibly say that this act was not effectual to destroy previously existing remedies, but it can not say that it confers the new remedy upon any excluded from its benefits.

The first section requires as a condition precedent to the liability of the State and the issue of the Comptroller's warrant, that the court shall determine "that the money was *wrongfully collected* AS NOT BEING DUE *from the party to the State.*" Now it can not be asserted with any show of reason that money which is due when tendered if not accepted, is not still due. It may be recovered in a suit and the tender only bars costs and interest. This case, then, which asserts that the money was *due* and was tendered renders it impossible to make the case which would entitle the plaintiff to the Comptroller's warrant.

It is worthy of observation, too, that if the Legislature intended the act to apply to cases of this character, they would have made further provision for the acceptance and cancellation of the funds tendered, and would not have left the act imperfect in this respect.

The second section is supposed to militate against this view, but when that second section comes to be read carefully, it is evident that it is intended to make certain to a certain intent, not that this remedy should apply to certain cases, but that there should be no other remedy. This sec-

tion therefore enumerates three cases: 1st. Collection illegally. 2d. Attempt to collect illegally. 3d. Attempt to collect in funds receivable under the law and other than such as the taxpayer may tender or claim the right to pay, and provides that there shall be no other remedy for either of these acts. So far the act is merely negative and for greater certainty.

It then provides that no writ for the prevention of the collection of revenue shall issue, whether injunction, supersedeas, prohibition or any other writ or process whatever." Thus far the section is negative and prohibitory. It then proceeds, but in all cases in which, for any reason, any per- shall claim that the tax so collected was *wrongfully* or *illegally collected*, the remedy shall be as above provided and in no other manner."

I will not deny that a liberal construction of this part of the act might give the remedy—though it would strain the language of the first section greatly to make this a remedy against the State. Nor does the language, requiring that the *tax* be *illegally collected*, cover a refusal to accept forbidden funds. This part must also be strained to cover the case of a collection in other funds than those tendered. Observe also that the enumeration preceding explicitly state this case of illegal funds, while here it is left out. This is clearly done *ex industria*. But the Legislature meant to put this beyond any possible question. The 5th section, therefore, enacts "that nothing in this act shall be so construed, or have the effect to subject any officer of the State *to any* suit for a refusal on his part to accept, in payment of revenue to the State, any kind or description of funds, or securities, or papers, other than such as he may be authorized and required to receive for the time being by law."

In the face of this section there can be no possible mode of construction that would justify a moment's doubt that the Legislature meant to prohibit just such suits as this in

any form. It first prohibits these *among others*, in any other form; then it follows with a prohibition of these in this form—thus making the prohibition total.

It is pretty evident that this 5th section was added during the progress of the bill through the two houses, so as to make it certain beyond any question that there should be no remedy in these cases. The State had, in every form, repudiated these claims, and it did not mean to pay them, or allow any appeal to the courts to pronounce upon the policy or propriety of the act of rejecting them. It had declared by the Constitution of 1865, that these notes should not be paid. It had required the Bank of Tennessee to make a trust denying their validity. It had directed the officers of the State not to receive them, and in this act it simply meant to adhere to the policy, and to provide remedies in other cases without providing for any interference with this class of cases from any source judicial or other.

B. J. LEA,

Attorney General for the State of Tennessee.

Supreme Court of the United States.

OCTOBER TERM, 1878.—No. 67.

JOHN Y. KEITH, IN ERROR,

vs.

E. A. CLARK, COLLECTOR.

ERROR TO THE SUPREME COURT OF TENNESSEE.

ARGUMENT OF J. B. HEISKELL,

Of Counsel for Clark and the State of Tennessee.

I am satisfied that the jurisdiction of this court must fail upon the grounds stated in the brief of Mr. Attorney-General Lea, and regret to have to impose upon the court the infliction of an elaborate argument on the alleged merits of the case. I wish first to add a few words on that question of jurisdiction. I will then endeavor to meet the views of the counsel for the plaintiff, and set the questions involved in their true light.

Mr. Attorney-General cites, but does not call particular attention to, the case of The Insurance Company *v.* The Treasurer, 11 Wall., 204. The brief of the plaintiffs filed in this case insists that the Federal question appears to be involved, and to have been decided in the inferior court in Tennessee, and insists that from that fact this court may infer that the affirmance was upon the same ground. Now, the court will perceive, upon an examination of that case, that it was precisely that point which this court negatived in 11 Wall., 204. There, the Supreme Court of New York decided the case on a Federal question; the Court of Appeals affirmed, without giving any reasons; and this court holds, that *non constat* that the Court of Appeals decided the Federal question at all.

It may be true in this case that the circuit judge decided the Federal question, but it in no manner appears that the

Supreme Court did. The case in 11 Wallace is a full and controlling authority to the point that an affirmance will not be held in this court for the purpose of ascertaining the existence of jurisdiction, to prove that the questions decided in the court below were decided in the court above. The court above might have decided the very reverse on this point of what was decided below, and yet they would, on their view of the act of 1873, have affirmed it.

Mr. Attorney-General then presents the grounds on which he thinks the court below ought to have affirmed upon the State law, withholding jurisdiction in this form, and on this ground it seems to me that argument is impregnable.

I will now proceed to the argument of this case upon its supposed merits, in doing which I will first consider the cases cited by the plaintiffs in their briefs, and then resume a more methodical argument of the questions involved.

The authorities cited by the plaintiffs, on the relation of States in rebellion to the States as reconstructed, are those to which I refer, and on this point five cases are cited. In none of these do the facts raise the questions presented in this case, the leading factor of express repudiation of the act of the suppressed government being absent in all of them but the present.

In Huntingdon *v.* Texas, 16 Wall., 413, it was held that the rebel State government had power for legitimate purposes to dispose of the bonds of the United States held by the State of Texas. The State, by her Legislature, had not repudiated the act of the suppressed State, and the courts had to act alone upon the presumption that the conquering party in a civil war adopts all acts that it does not repudiate.

In Horn *v.* Lockhart, 17 Wall., 570, the point adjudged is that some acts of a State in rebellion will afterwards be repudiated by the political power of the successful government, without express legislative instruction or action on the subject, upon principles of public policy. This is applied to such action as is directly in aid of the civil war. What the case is cited for in the plaintiffs' brief, is what we and all writers on the law of nations recognize: that indifferent acts of the

suppressed party in a State are regarded as being approved and ratified by the victor, unless expressly disavowed and nullified. What the case therefore proves for the plaintiffs is nowhere disputed. Its real significance is to recognize and establish a step beyond the one we contend for, that, without the action of the political power, the courts will take upon themselves to pronounce certain acts void. The position we occupy is the intermediate one, thus: It is admitted that indifferent acts affecting private parties are valid, unless repudiated. There are acts which affect the rights and property of the State, which the victor may adopt or reject, and the courts will follow the edicts of the political power as to those. There are still others which the courts will, without action of the political power, repudiate.

Now, it seems to me that this last in a measure supports and establishes the intermediate proposition on which we base our defense. It has no value whatever in support of the plaintiff's contention. It has much as establishing a class of cases in which the victor is not bound, and it at least suggests naturally a ground between.

Sprott *v.* United States, 20 Wall., 459, is subject to the same considerations precisely, as it was a case of purchase of cotton from the Confederate States; a contract which this court held to be void, without aid from the political department, upon principles of public policy.

The case of The United States *v.* The Insurance Co., 22 Wall., 102, seems to approach more nearly, in the generality of its language, to the point in controversy; but it did not involve the consideration of any legislation in which the State was interested, it relating to a charter of incorporation merely. Nor did it present the question of the right of the victorious party to ratify or repudiate; for there was no act to raise that question.

The case of City of Richmond *v.* Smith, 15 Wall., 429, is a most astonishing citation. It is stated as deciding points not involved or in any wise considered or talked of in the case. It is not stated in the case that the city of Richmond was ever, in any way, under any provisional or irregular government, or reconstituted or reconstructed, or that any

change ever took place in her organization, officially or otherwise. The court simply held the city liable for the destruction of property, destroyed by her authority, on a promise to indemnify the owners, and that she could not defend by showing that about that time the premises where the property was were burned over, and that the property would have been burned if it had not been previously destroyed. This and the binding force of a State decision are absolutely the only points in the case.

None of these cases have the least tendency to support the position of the plaintiffs, that in that class of cases in which the effort is to bind the reconstituted and victorious State, they have no election to affirm or reject the acts of the vanquished.

They do show that there is a class of cases in which this court will hold the act of the *de facto* government void, but they leave the ground of this case untouched and virgin soil.

Now, what I maintain is simply this: That while, as to indifferent acts, the acts of the *de facto* government will not be disturbed, and as to all matters which are against the policy of the conqueror they will not be allowed to stand, that as to all matters in which the insurgents attempt to bind the State, it is at the option of the State to be bound or not.

Now, suppose the Confederate States had assumed to be the United States, and claiming to exercise the authority of the true and legitimate government; suppose they had for a time occupied these seats of Federal government, and issued grants of land and bonds in the name of the United States of America,—who is there here bold enough to assert that those would have been valid bonds, and that those grants would have conveyed a good title? Yet that is precisely what, when stripped to the skin, the plaintiffs have presented as the fundamental proposition in their case. It is the negative of that proposition that we assert.

I presume the proposition needs but to be seen to be rejected. The case here is supposed to cover it up so that this court will never be able to unroll the cerements in which it is mummified and covered up, and that they will decide it without ever revealing its true character. The only difficulty

that involves this case, is in the complications which surround it to obscure the simple proposition stated above. These are, first, the fact that the State of Tennessee, in this great civil war, was not the only party to the war, but was an aliquot of a vast federation. It is in this complex relation that her relations to the war, and the rights and duties and obligations which grew out of it, are somewhat obscured. Tennessee asks only that this case be thoroughly illuminated.

The second complication in this business, is that the obligation which it is the effort of this suit to saddle upon the State is not the direct act of the State, but of one of the agencies which the State had constituted for the purpose of transacting her business. But this is but the husk of the matter. The real question is,—Do the plaintiffs seek to enforce against the reconstituted State an obligation which is imposed, if at all, by the act of the subjugated government, its agencies, or its authorities? It is to these points that I will direct my attention in the succeeding part of this argument.

1st. Then of the power of the *government* of 1861, after the act of separation, to bind the State.

That government issued bonds and did various acts directly as to which there is no difficulty in determining what the rights of the government of 1865 are. The Federal authority has interfered as to certain of these, not to give a right to the State to throw off a liability on them, but to restrict the power of the State to ratify them, to declare that no provision shall be made for their payment.

Now, I insist, that, as to all bonds issued by the government of 1861, the State of 1865 had her option to reject them. If she stood free of any complication with the Confederate States, and the revolution had been intestine merely, this is too plain for argument. She was bound by no contract that the rebels in the State had made to bind their organization, which they claimed to be the State, but which was not the State. This seems to me a plain proposition. But this is not a Dorr rebellion. The United States on one side and the Confederate States on the other enter into this arena to complicate what would be simple otherwise. Still, I maintain that the true theory is, that, as to each State, her rights, duties, and

obligations are to be tried and settled by treating the civil war as existing in each State, and regarding the other States as but allies of the contending parties. This would clearly have been so as to States in which the parties were equally divided, and which, standing on a border line, each organized and for a time maintained an actual organization. Take, for instance, Missouri, and suppose the government had been seized and held for a time by the Confederate party, and that both were organized fully at the same time. Certainly the principle would be perfectly applicable, without referenee to the fact that the United States stood ready to, and afterwards did, interfere effectually to put down this usurping power. But the matter of time and of contemporaneous occupation, and the question whether one party is temporarily silenced and subdued, are mere accidents, not essential to the theory of civil war. The civil war exists, though one party may for the time be driven out into the territory of allies, and be only seeking to return and reclaim their legitimate control by the aid of others. It is true, as to Tennessee, that most of the party of the Union were obliged to carry on the war for a time from the 'vantage-ground of neighboring States, but they soon regained, by the aid of Union allies, a foothold on their own soil, and ultimately recovered the main portion of the territory, and eventually reestablished a permanent government, which is continued to this day. Now, I contend that such a state of facts is to have the same effect as if Tennessee had stood in no other relation to the United States than she would have held to a foreign ally in a civil war confined to herself and the foreign ally of one party.

Suppose, then, that two parties in a State, each claiming to be the legitimate government, shall organize each all the essential elements of a complete State, and each exercise the function under preëxisting laws of making contracts, or issuing bonds in the name of the State; or suppose each shall grant the same land to different grantees, or the same exclusive franchises to different corporations,—now, when the issue is settled, which of these is the true government, by the success and permanent establishment of one of these contending par-

ties, which contract, which bond, which grant for land or franchise will prevail? They cannot both be valid and obligatory. The victorious government may adopt acts of the subjugated party, but that is a different consideration. Only one set of these acts are valid *per se*. Which? Certainly those of the party which turns out to be the State.

But the acts of secession of 1861 complicated this simple question by bringing into it the relation of the Federal Government and the civil war in the States. A party existed in Tennessee which asserted from the beginning the nullity of the act of secession, and the other States, from the date of that measure, regarded the acts of the Government of 1861 as null and void. From that time the issue was in process of settlement by wager of battle; and previous to 1865 that issue was determined by the victory of the Federal arms, and the State Government of 1865 established on a firm basis. Now, my theory is, that from the time the Government of 1861 assumed the attitude of resistance, it became incapable of binding the State to any contract, or of imposing upon the State any obligation which the State, when it came to its own again, was bound to submit to as its own contract and obligation. What may be the usage of modern nations in respecting acts of revolutionary and provisional governments is not the question. It is simply, Is the victorious party in a civil war bound to submit to the contracts and obligations assumed by the subjugated party in the name of the State as obligations and contracts of the State? I submit, then, that the acts of the Government of 1861, by which that Government undertook to bind the State, were never binding on the State as reconstructed and reorganized in 1865, that being the only Government that had possessed the authority to bind the State; in other words, that being the State.

Now much is said about government *de facto* and officers *de facto*. Undoubtedly, in matters indifferent to the body politic, and, especially, in all matters which it is the interest of the State to leave undisturbed, the usage of nations is to regard them as being valid; and the relator's brief abounds in such cases, and on this subject it cites no others. I cheer-

fully concede the law to be that all such acts are valid, either of themselves, by a sort of implied recognition, or become so by the failure of the successful party to repudiate them. Upon which leg the matter stands is a mere matter of theory, and of no consequence in practice. I concede further, that, as to indifferent contracts of individuals *inter sese*, there is no principle that affects their validity because the nation is in war, civil or international. But, as I have shown above, the rightful Government can alone bind the State; and, in a civil war, that is the rightful which is established. I maintain, then, that, from the 6th of May, 1861, the Government of 1861 could impose no obligation upon the State. The United States have not only recognized this doctrine of the want of power to bind, but they have, by the 14th amendment, sec. 4, restricted the power of the States to ratify certain of these contracts, wherever they are directly connected with the levying of war. If these were contracts of a *de facto* government, (and the contracts of a *de facto* government are binding on a *de jure* government afterwards established by the issue of war,) then the United States have done a most unjust act in compelling States to repudiate obligatory contracts imposed by due authority. If, on the contrary, the theory is the true one, that the State is not bound by any contract of a usurpation temporarily in possession of the powers of the State, then the amendment is a just discrimination and restriction, which allows the State to exercise its own discretion in ratifying and adopting such contracts as have been made for proper objects, and prohibiting any ratification of such as were for resistance of the National Governments.

I repeat, if the *de facto* Government of a State has power to bind the State, it must, in virtue of its *de facto* sovereignty, be the judge of what it shall bind the State for; and what it decides to bind it for cannot be held to be subject to those rules which courts apply to contracts against public policy. The power to bind exists, or it does not. It does not exist in part, and non-exist in part.

The case of Howe *v.* Lockhart, 17 Wall., 580, holds that a law of Alabama directing investments in Confederate bonds

was void as being "a direct contribution to the resources of the Confederate Government. It is true, the court *arguendo* state briefly the general proposition, that other laws are to be regarded as valid, but whether by virtue of their implied adoption and recognition they do not say.

In the case of Huntingdon *v.* Texas, 16 Wall., 402, there was no act by the reconstructed State in any manner rebutting the implied approval of the issue of the bonds, and so no fact to raise the question whether the act was valid *per se*, or by reason of an implied ratification. I admit, the language is strong, but it is not a *decision* upon the point now raised.

Sprott *v.* U. S., 20 Wall., 464, was a case involving a claim to cotton under the Confederate States, and did not involve the question of the powers of the States. Its general statements are, therefore, to be taken as other *obiter dicta* on matters aside from the point in issue.

United States *v.* Insurance Cos., 22 Wall., 102, contains a review of all the cases. It will be seen that the first of the cases, 7 Wall., 700, as cited in 22 Wall., shows that Chief Justice Chase, in his opinion, does not pretend to speak accurately, but prefaces his remarks with, "It may be stated perhaps, with sufficient accuracy," &c., showing that the court was not upon these matters, considering the point now in controversy.

In all the cases, then, decided by this court, and cited by the relator's counsel, there is not one that decides upon a state of facts involving the principle of this case.

It is merely, in effect, a holding that, in the absence of a repudiating act, the courts will only condemn such acts as they can themselves see that it is the duty and policy of the State not to ratify.

But this case is subject to another complication. The Bank of Tennessee was a corporation of which the State was the sole stockholder, and, as such corporation, it stood in a relation to the State which is not of the simplest character. In one sense, it was a person with certain powers, with certain property which it had the right to bind or dispose of, subject to sue and

be sued, and to be governed by a directory established by the State and appointed by the Legislature.

In another sense, this bank was merely a fiscal agency of the State, as much so as a treasury department incorporated and made subject to suit. It received and kept all the State revenue, and all the business of the treasury was done through the agency of the bank, the treasurer receiving nothing and paying out nothing.

A view of this institution, which considers and regards it as a mere corporation managed by a directory, without considering its other aspect, will be misleading and tend to erroneous conclusions. (See extract from brief in Supreme Court of Tennessee.)

The courts of Tennessee have regarded it in both aspects. When they decided the case of Atchison & Duncan against the bank, they treated the bank as a corporation disposing of its own assets, and binding its own effects. It seemed to me that even there they might have looked deeper and seen by its relation to the State that it was to share the fate of the Government that controlled it. But the court thought otherwise, and that decision is subject to no review. But when the case came to be presented in view of the right of the bank to bind the State, they held that while the Government of 1861 could not directly bind the *State*; so, that the bank, while in the control of that Government of 1861, could not bind the State by indirection. (See Rec., p. 150, for opinion.)

Now, let us resort to comparison again for a moment. Suppose the Dorr Government in Rhode Island to have found a State Bank there, which it was the right of the State to control, and whose issues the State guaranteed. Suppose that Dorr seized upon it and compelled it to issue circulating notes for his war purposes; and suppose him to have afterwards been put down and the Government re-established; passing the question of the right of the bank to repudiate her issue, would any one pretend that the State would be bound as guarantor upon such issue?

But in this case it is said no such thing took place, the bank used old issues for these unlawful purposes, and the new

issues was only used for lawful purposes. The *State*, the real State, was, as we have seen, bound by no act of the Government of 1861, and by no act of the bank under its manipulation for war purposes, and it had the right to repudiate all its acts during the control of the Government of 1861. But its acts could be distinguished with accuracy only as to the notes issued by the bank while under that unlawful control. The State when restored, therefore, impliedly adopted the issues outstanding or reissued, but refused to recognize that so unlawfully issued, so far as it was distinguishable by date or by the signature of the President, Torbett, who came in three days after the ordinance of separation.

But it is said there is nothing to condemn these issues, as being issued to aid the war. To return to the illustration of the Dorr Rebellion. Suppose, instead of compelling the bank to issue new notes, he had simply seized and used the assets and effects, and the bank, while he still held control over it, had proceeded to issue the new notes, could this indirection affect the fact that it was by his act that the new liability was to be saddled on the State? While we are not able to trace the new issues of the bank into the war bonds, $4,625,000 of which the bank took, issuing its notes therefor, we do show an absorption of that much by the military commissioners of the State, and that this appropriation of the old issues led to the necessity of the new issues is unquestionable. Whether this was designed to avoid the consequence of illegality, or whether it was merely the natural consequence of the precedent facts can in my view make no difference. If Dorr had, when he seized upon his supposed bank, directed his directory to issue new notes for ordinary purposes, and had seized only upon the old and existing issues, he could not by that device have avoided the consequence that the supposed contract resulting from the issue of such notes would not bind the State. The form in which this thing was done, was not of the essence of it. If, without any caution to his directors he seized the funds which were in the bank for reissue, and the new issue merely re-

sulted as the natural consequence, the legal effect would be the same.

It is said, however, that the issue was not abnormal or excessive, measuring by other years. In statistics general average may be a matter of great importance, but in a question like this each period must afford the measure of its own needs and requirements. The bank had, and issued to the military board $4,625,000. The legitimate business of the bank in this state of things, called for the additional issue of $1,469,000. Suppose that 4¾ millions had remained in the bank: where would have been the need of this new issue? If we are to derive anything from the condition of affairs, why do we turn from that which existed then to what existed the year before, and the year before that, to see what is clear from the present time and its lessons. The exigencies of 1861 are measured by an issue of 1½ millions, after a subtraction of 4¾ millions, for purposes admitted to be illegal. The 4¾ millions therefore in hand, as compared with this 1½, afford the measure of the needs of that time. If the 4¾ had remained, would they have supplied the 1½ or not is a question of fact.

There is no question here of innocent holder for value. History supplied the notice to all persons who dealt in these supposed securities, of all the facts necessary to put them on their guard as to their validity, and they must be treated as purchasers with notice. This applies to all persons dealing with the bank at the time these notes were being issued, as they must be charged with knowledge of passing public events.

Extract from the Brief of Hon. W. F. Cooper, in the Supreme Court of Tennessee.

My first position in regard to these claims is, that they were void in their inception, if the lawful Government chose so to treat them, and that the political departments of both the State and General Government have chosen so to treat them, and the courts cannot go behind their action.

The people of the State of Tennessee undertook to separate from the United States and join the Confederate States. This was accomplished, as far as it could be done, by the act of separation, and the legislation of the 6th of May, 1861, and the effect of what was done was to bring the State, as then controlled, and especially its legislative and executive branches, and the Bank of Tennessee, as their fiscal agent, into rebellion and war with the United States. It has been repeatedly decided by the courts of the United States that war is a state of facts, and needs no proclamation of the President or act of Congress to establish it; but that if anything was needed, it was supplied by the President's proclamation of the 15th of April, 1861, declaring the existence of an insurrection. (The Prize Cases, 2 Black, 635; Lawrence's Wheat., 535.)

"As a civil war," says the Supreme Court of the United States, in the Prize Cases, "is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know."

"All persons residing within this [insurrectionary] territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."

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In the case of *Luther* v. *Borden*, (7 How., 1,) the Supreme Court of the United States held that the same principles and rights applied to a rebellion within a State, where a new (or illegal) Government undertakes to overthrow an old (or legal) Government. The Legislature of the old Government had in that case established martial law, and Chief Justice Taney, in delivering the opinion of the court, observed, among other things, that "if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which we can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself, and overcome the unlawful opposition."

This language is quoted by Nelson, J., in his opinion in the prize cases, with approbation.

Now, what was the effect of the status brought about by the acts of the rebellious government in this State, on the 6th of May, 1861, and afterwards, until the lawful authority was restored, upon the acts of the rebellious Government with its citizens, and upon the acts of the citizens as between themselves? It is upon the answer to this question that the correctness of our first position must, in a great measure, depend.

Here is what Chief Justice Taney says on the subject, in *Luther* v. *Borden*, (7 How., 1, 39,) and he is borne out by all the elementary text writers:

"The laws passed by its Legislature during that time (during the time a State is in rebellion) were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of all its courts in civil and criminal cases null and void, and the officers who carried the decisions into operation answerable as trespassers, if not in some cases as criminals."

"It rests," he says, "with the political power of a State to pronounce upon the legality or illegality of the government acting for the time being.

"Moreover," he adds, "the Constitution of the United

States, as far as it has provided for an emergency of the kind, and authorized the General Government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department." (7 How., 42.)

The Dorr rebellion of Rhode Island, which was the particular rebellion under consideration, was not a rebellion of a part of the State against the whole. It was a rebellion of the whole State, by holding conventions, elected by, it was claimed, a majority of the people, and by a Legislature chosen in like manner, and its successful and continued organization would, as Chief Justice Taney said, have made the acts of the old Government illegal and void. It is the political department of the Government that survives the rebellion, without reference to the abstract question of right or wrong, which is clothed with the power "to pronounce upon the legality or illegality of the Government acting for the time being." And this, whether the rebellion be of a whole State, as in the case just mentioned, or of a part of a State, as in the case of the Franklin Government, presently to be noticed, and whether the rebellion continue, as in both these instances, only for a few months, or for only two or three years, as in the case of our own rebel State Government, or for twenty years, as in England during the great revolution, which ended with the Protectorate of Cromwell.

To the same effect as *Luther* v. *Borden* is one of our own early cases, *Ingram* v. *Cocke*, 1 Tenn., 19, in relation to the acts of the Franklin Government. The court say, in that case: "When Governments *de facto* cease to exist, the former or legitimate Government, by their legislative acts, usually furnish the grounds upon which municipal courts proceed in giving an opinion." In other words, to use the language of the Supreme Court of the United States, *White* v. *Hart*, 13 Wall., 651, "the result (to the rebel citizen) depends upon the rule, as defined in the law of the sovereign against whom he has offended." The action of the political department under which the judges hold their offices, upon anything done pending the rebellion, is conclusive upon the courts.

(See also *Rose* v. *Himely*, 4 Cr., 273; 3 Wheat., 324, 364; 13 Pet., 420; *White* v. *Hart*, 13 Wall., 649.)

By turning to Mr. Meigs's Digest, § 988, it will be seen that the Franklin Government adopted a constitution on the 14th of December, 1784, and ceased to exist about September, 1787. It will be seen, also, that the Legislature of Tennessee passed several acts, from time to time, validating proceedings under the Franklin Government, such as the granting of letters of administration, probate of instruments, and even marriages. Some of these acts are cited by Judge Haywood, in delivering the opinion in *Townsend* v. *Townsend*, Peck, 1, as retrospective laws which were valid.

The right of confiscation by the successful belligerent may be referred to in this connection. "The question of what shall be done with enemy's property," says Chancellor Kent, "is one rather of policy than of law, and is one properly addressed to the consideration of the Legislature, and not to the courts." (1 Kent's Comm., 60.)

"Respecting the power of Government (to confiscate enemy's property,)" said Marshall, Chief Justice, "no doubt is entertained. That war gives the full right to take persons, and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and, when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will." (*Brown* v. *United States*, 8 Cr., 110, 143.)

This doctrine was applied in all its rigor, without reference to their personal loyalty or disloyalty, to the citizens of the Confederate States, as enemies, in *Miller* v. *United States*, 11 Wall., 268.

I do not understand that there is any conflict of authority on these two points; that it belongs to the political department of the successful Government to say what laws and what acts of the rebellious Government, or of its citizens, shall be valid or invalid, and to determine whether any and what

property of the rebels shall be confiscated or destroyed, and that, in the language of Chief Justice Marshall, "the judicial department must give effect to its will."

With these principles distinctly before us, let us see now what has been done in the premises by the political departments of the State and United States Governments.

The fifth section to the schedule to the constitutional amendments, passed in February, 1865, while the war was still flagrant, by a convention and under a State Government recognized by the Government of the United States, provides: "All laws, ordinances, and resolutions, as well as all acts done in pursuance thereof, under the authority of the usurped State Government, after the declared independence of the State of Tennessee, on or after the 6th of May, 1861, are unconstitutional, null, and void from the beginning," with a proviso in favor of judicial decisions made pursuant to the laws enacted previous to that date, and between parties in court and litigating their rights.

Section sixth is: "All laws, ordinances, and resolutions of the usurped State Government, passed on or after the 6th day of May, 1861, providing for the issuance of State bonds, also all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th of May, 1861, and all debts contracted in the name of the State by said authority, are unconstitutional, null, and void; and no Legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

The act of the Legislature of the 16th of February, 1866, chap. 28, provides for the winding up of the Bank of Tennessee, and directs an assignment to be made to secure, first, the school fund, and second, the remaining creditors of said bank, "excluding all claims and demands of all kinds after the 6th of May, 1861, as absolutely null and void."

By the joint resolution of Congress of the 24th of July, 1866, restoring Tennessee to its rights in the Union, the adoption of the constitutional amendments whereby "all ordinances and laws of secession, and debts contracted under the

same, are declared void," is referred to, and made the ground in part of the restoration of the State to its rights.

And by the fourth section of the fourteenth amendment to the Constitution of the United States it is declared that "all debts, obligations, and claims incurred in aid of insurrection and rebellion against the United States shall be held illegal and void," and the United States and any State are forbid to assume or pay the same.

The sixth section of the schedule to the constitutional amendments of 1865, expressly designates the new issue of the Bank of Tennessee as illegal and void, and also the claims of the depositors of the bank by deposits made after the 6th of May, 1861, if such claims are, as contended for on the other side, debts of the State. And the act of the Legislature of the 16th of February, 1866, expressly puts the seal of condemnation on the claims of these depositors. This was an act of the political department of the Government shortly after the State had again come under the control of a loyal Government, and before the proclamation of the President of the United States, which declared the insurrection in Tennessee to be at an end. And whether he construe the act as the exercise of the war power of confiscation, or as a legitimate designation of the invalidity of certain acts for the guidance of the courts, is immaterial. In either event, it was within the competency of the political department of the Government, and conclusive on the courts.

The effect of the constitutional amendments of 1865 was to designate as void all laws, etc., passed after the 6th of May, 1861, but impliedly to leave all previous laws in full force and effect, and to validate everything done under them. So the designation of certain particulars as void by the 6th section in like manner left the courts to infer that they might treat as valid everything not thus specially designated. And inasmuch as every act of the rebellious Government, or its subjects, was, as we have seen, illegal and void at the option of the legitimate Government, the schedules to the Constitution of 1865 were more merciful than could have been reasonably expected from a victorious Government. Whether the

selection of the acts to be treated as void was wise, or just, or proper, was for the political department to determine. This action of the political department of the successful State Government was, in effect, sanctioned by the political department of the United States Government, both by recognizing the State Government, and afterwards by the resolution of Congress of the 24th of July, 1866.

The schedules to the Constitution of 1865 and the act of the Legislature of the 16th of February, 1866, are not, in this view, attempts to impair the obligation of contracts, which is the argument on the other side, and which we concede cannot be done, but are legitimate acts of the political departments of the State and United States Governments, strictly within their competency, designating, among the various proceedings which took place during the rebellion, and all of which were illegal and invalid, so far as the legitimate Government was concerned, such of them as should be treated as void, and impliedly validating all others, thus giving the courts, in the language of our Supreme Court in *Ingram* v. *Cocke*, 1 Tenn., 19, "the ground upon which they should proceed."

We agree that the annulling of a valid contract by subsequent legislative act or constitutional amendment would be void, because in conflict with that provision of the Constitution of the United States which prohibits the impairing of the obligation of a contract. But that provision of the Constitution can certainly have no application to contracts entered into under a usurped Government, by and between persons in insurrection and rebellion; and, *a fortiori*, to contracts between the usurped and rebellious Government itself, through its fiscal agent and its rebel subjects. All such so-called contracts are at the mercy of the legitimate Government, when restored. It is for the political department of the Government to say how they shall be treated by the courts. The rights of the rebel States and their citizens under the Constitution were, as said by the Supreme Court of the United States in *White* v. *Hart*, 13 Wall., 651, "suspended," and the extent of the punishment, either of person or property, depended upon the rule as defined in the law of the offended

sovereign. Those States, as said by the same court, on the same page, were at no time out of the pale of the Union. Their citizens had not the rights, therefore, of a foreign enemy who has been subjugated, but only such rights as the offended sovereign might see proper to extend to them.

The learned Chancellor, in his opinion in the court below, seemed to think that there was a distinction between contracts entered into under ordinances and laws of secession, or directly with the rebel authorities or agents, and contracts between private citizens, and that the ban of invalidity could only be predicated of the former. But I do not understand that any such line of distinction exists. By the rebellion, those who became parties to it, either voluntarily or through coercion of circumstances, are placed at once out of the pale of the law; and everything they may do, either with their rebel Government or between themselves, is tainted with illegality, and void, if the legitimate Government chooses so to treat it through the action of its political department. Of course, modern usages do not ordinarily result in such indiscriminate condemnation of all acts, public and private. But, to use the language of C. J. Marshall, already quoted: "The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will, more or less, affect the exercise of this right, but cannot impair the right itself." And certainly no just complaint can be made upon the score of the unmerciful exercise of the right in this State. The condemnation was limited to a class of claims which, to say the least, were open to grave suspicion, if not clearly guilty of direct aid to the rebellion.

Moreover, even if the obligation suggested were well founded, it could have no application to the "new issue" of the Bank of Tennessee. That issue may be literally said to have been put into circulation "under the ordinances and laws" of the rebellious State Government. Except for the fact that four millions of State bonds were authorized by that Government to be issued for war purposes, and that a Military Board was organized to arm and equip troops, and purchase military stores in aid of the rebellion, and the bank, as

the property and fiscal agent of the State, was required to lend its assistance, and did so lend it with full knowledge on the part of its officers of the unlawful purpose, not a dollar of the "new issue" and less of the "old issue" would have been used. If, in order to stamp this "new issue" with illegality, it should be deemed necessary that it should owe its issuance to a law or ordinance of secession, and to the direct act of the rebel authorities, these are not wanting. Any person who dealt directly with the bank during that period dealt with the rebel State Government, just as much so, under the proof, as if it had dealt directly with the Military Board or the Governor or the Treasurer of the State. The legislation of May, 1861, changed the character of the institution from that of a bank for ordinary banking purposes to that of a fiscal agent of a formidable rebellion. It is too weak a phrase to say that the bank was the right arm of the rebel State Government—it was the Government itself, and its every act was the act of that Government. As well might you attempt to shield from the charge of illegality acts of the Military Board, because those acts were between private citizens, as the acts of the Bank of Tennessee. And no one will pretend that the acts of the rebel Government and all its branches and agents were not void. (See *U. S.* v. *Keehler*, 9 Wall., 83; *Hickman* v. *Jones*, 9 Wall., 193.)

My argument, let it be distinctly understood, does not call in question any decision of this court heretofore made. It concedes their correctness to the full extent to which they have gone. For, while I contend that all acts of the rebel Government and of its citizens, while in rebellion, were illegal and void, because done without the pale of the Constitution and laws, from which they had withdrawn, I concede that all of those acts were amnestied and validated by the action of the political department of the United States, and of the lawful State Government, except those specially excepted, and except, also, such as were, in their very nature, treasonable, and therefore void. I may concede, also, that ordinary contracts between individuals, not made with the rebel authorties or their agents, and not tainted with illegality by their very

nature, are ordinarily considered as validated by the silence of the conquering Government in regard to them. The courts would feel at liberty to treat such contracts as valid by the modern usages of war, unless specially directed by the political department of their own Government to treat them otherwise. This is the only case which has come before this court where the act brought in question was the direct act, as we contend, of the rebel State Government, and positively declared to be illegal and void by the political department of the loyal State Government, and, as we insist, also, by the political department of the United States Government. It raises, therefore, a question not heretofore brought before the court in reference to acts and contracts done and entered into pending the civil war, and that is, whether the action of the political department of the Government, in regard to any such acts and contracts, is not conclusive upon the courts. My argument is based upon the conclusiveness of such action.

But, it may be said, the schedule to the constitutional amendment is abrogated by Article 11, section 1, of the Constitution of 1870. That section is in these words: "All laws and ordinances now in force and in use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the Legislature; but ordinances contained in any former Constitution, or schedule thereto, are hereby abrogated."

The language is, "ordinances contained in any former *Constitution or schedule thereto.*" Are the constitutional amendments of 1865 a constitution, within the meaning of the section? And are the provisions of the schedule which we have been commenting on, ordinances, within the meaning of the section?

These are, perhaps, hypercritical questions, which it is scarcely necessary to answer. The abrogation of the 5th and 6th sections of the amendments of 1865 would not have the effect supposed. The provisions of those sections did not annul the laws, ordinances, acts, and proceedings specially mentioned. They were illegal and void before. The true effect of these sections was, by implication, as we have seen,

to validate all acts done during the rebellion, except the acts set apart and designated. As to them, it was a direction for the guidance of the courts, that they alone were to be treated as void *ab initio*. The abrogation of the sections may invalidate what was impliedly validated thereby, but it cannot render that valid which was, from the beginning, void.

Besides, the provision of the new Constitution does not abrogate the act of the Legislature of the 16th of February, 1866, nor the resolution of Congress restoring Tennessee to its rights. It did not require a constitutional amendment or ordinance to express the will of the political department of the State Government on the subject. An act of the Legislature was equally efficacious. And this act, if the point be at all material, was passed before the 2d of April, 1866, when the President of the United States officially announced, by proclamation, that the insurrection in Tennessee was at an end.

It is obvious, therefore, that the abrogation mentioned can have no effect upon the question we have been discussing.

If we are right in our argument, the courts have no option, except to pronounce the claims under consideration illegal and void, leaving the parties to apply to the Legislature for redress.

The question of the illegality of the claims of these depositors growing out of the facts which have been introduced in regard to the "new issue," does not arise as the record now stands. The case of the depositors comes up on demurrer, and, of course, no evidence has been taken on this point.

If we are wrong in our argument, the question still remains, so far as the "new issue" is concerned, whether it is not illegal and void, because, as a matter of fact, issued in aid of the rebellion, and under the fourth section of the fourteenth amendment to the Constitution of the United States.

The proof is, that a military board was established on the 24th of April, 1861, by the rebellious State Government, for the purpose of arming and equipping troops, and purchasing military stores in the war then flagrant between the United States and the rebellious States; that this board drew from

the Bank of Tennessee, and used for the purposes aforesaid, in the year 1861, the sum of $4,625,460.48, the president, cashier, and other officers and directors of the Bank of Tennessee knowing at the time that the military board was organized to aid the rebellion, and that the money drawn from the bank by the board was to be used, and was used, for this purpose. It further appears that the "new issue" was put into circulation by the bank after the 6th of May, 1861, and in order to meet the demands of its regular business and of the military board. The charter of the Bank of Tennessee shows that the bank belonged exclusively to the State, and was its fiscal agent. The court, moreover, knows judicially that the State joined the other Confederate States in rebellion, and that all its resources were used by the rebel State Government for the purpose of aiding the rebellion, and that the Bank of Tennessee was especially made an instrument to this end.

The statement of the business of the bank in 1861, in connection with the demands made upon it by the military board, shows that the new issue was put into circulation to meet the extra demand for currency occasioned by the calls of that board. The drafts of the board and of the rebel State Government are far more than enough to cover the new issue. No amount of testimony could make it plainer that the bank was forced to resort to the new issue by the draft upon its resources for war purposes. If so, it is obvious, that being issued for illegal purposes, they are void, in whosesoever hands they may come. (*Thomas* v. *Richmond*, 12 Wall., 349; *Hanauer* v. *Doane*, 12 Wall., 342; 2 South. Review, p. 73.)

The argument against this view is, that some of the business of the bank in 1861 being of the usual character, it is impossible to distinguish between the legal acts and the illegal, and that the doubt will inure to the advantage of the holder. But, as matter of fact by the evidence, the "new issue" must be taken to have been put in circulation solely by the pressure on the bank occasioned by the demands of the military board and the rebel Government. No doubt some of the old issue, which otherwise would have lain in the vaults, was used on account of the same pressure. The old issue thus

used cannot be identified; the new can. *It is not the consideration upon which it was actually issued that constitutes its illegality.* Some Confederate money may have been issued to buy food for women and children. It is the fact that the money was issued at all, that makes it illegal—its use being shown to have arisen by reason of the exigency of the war. No one could contend that Confederate money was not void as between the holder and the maker, the Confederate Government, although it may have been issued, in some instances, upon an innocent consideration, and may have constituted a good consideration in contracts between individuals. So, we insist, that no matter what may have been the actual consideration for the issuance of any part of it, the "new issue" is illegal as between the holder and the bank as the fiscal agent of the rebel State Government. (See *Thorington* v. *Smith*, 8 Wall., 1, 11, as commented on in *Naff* v. *Crawford*, 1 Heisk., 123.)

And even in the most favorable view for the note-holder, it is a case of "partial illegality." But "partial illegality" is as fatal as "total illegality." (See Mr. Daniel's article in 2 South. Review, p. 85, where the authorities are collected.)

If, under the circumstances, it were material to show the nature of the particular transaction in which the notes were put into circulation, there is enough in the record to make out a *prima facie* case of illegality, and to throw the burden upon the holder.

It is difficult, moreover, to see how the "new issue" can escape the sweeping provision of the 4th section of the fourteenth amendment. That provision is: "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, * * *; but all such debts, obligations and claims shall be held illegal and void." And whether this prohibition is to be considered as restricted to "debts, obligations and claims" of States, or is extended to such debts, etc., between individuals, is immaterial.

Extract from Brief of J. B. Heiskell, in Supreme Court of Tennessee.

CONSTITUTION OF THE UNITED STATES—CONTRACTS.

Into all this, the Constitution of the United States affecting contracts, does not enter. Suppose a suit was brought between two parties in a municipal corporation, to determine which is the proper authority, and pending the suit each party claims to act and does act for the municipality, when the suit comes to be decided, and this court comes to hold that one party was the rightful party, and the others had no claim of right to bind the corporation, does it impair the obligation of contracts? No more does it impair the obligation of contracts, than it does when it declares that my attorney in fact, who has made a contract *ultra vires*, has not bound me. Now, a civil war is but a grander *lis*, a wager of battle. When this is decided, and one of the parties to it declares that the other was never the rightful Government, it is not the impairing of contracts which happens, but it is a mere declaration of the result—that the overthrown Government had no authority to make the contract.

But it is said that the State must take all the contracts of the Bank of Tennessee or none. I deny that any such condition is imposed by the laws of nations upon States. When the United States sued in the courts of Great Britain for the funds of the Confederate States in the hands of British subjects or residents, did Great Britain or her courts stop to ask whether the United States intended to pay all the debts of the Confederate States? By no means. Did she even require her to apply any portion of the funds to pay the British creditors of the Confederate Government? Not at all. This is a precedent of the highest authority for our guidance here. The present State Government can recover the debts of the late State Government, without subjecting herself to any conditions whatever. So she can claim the benefit of any contracts of the bank as the fiscal agent of the State, though made with-

out authority, and is not bound at all by other acts done without authority. If a trespasser makes rails on my land out of my timber, I may keep the rails, but surely I am not bound to pay his hands. I take the benefit of his wrongful act, but do not render myself liable for his act by which the benefit was accomplished.

The following language is held by the court in *United States* v. *McRae*, 8 Law Rep., 84, Eq.: "The moneys, goods and treasure, which were, at the outbreak, the public property of the plaintiff, and which were seized by the rebels, still continued their moneys, goods and treasure, their right of property and rights of possession being nowise divested or defeated by the wrongful seizure of them. And if at the end of the rebellion, any of such moneys, goods or treasure, or the produce thereof, capable of being identified or earmarked, could be traced into the possession of any person, the rightful owners would be entitled to apply to the proper tribunal having jurisdiction over such person to award restitution. If such person were an accomplice, a *particeps criminis*, or had received the property with full notice of the title of the rightful owner, the latter would be entitled to an order for restitution, *simpliciter*. If he had received it as an innocent factor, banker, or other agent, the right to restitution would be, or might be, of a more qualified or limited kind. It would be, or might be, subject to any claim or lien which in his character of innocent bailee without notice he might have." The rights would depend upon the law of bailment, etc.

The case of White *v.* Texas, 7 Wall., 700, cited by the counsel for the depositors, is not one of a contract repudiated by the Government of the State, but one in which a defendant was seeking to screen himself from liability, because the contract which he made was with the Government subsequently overturned, and it clearly establishes the right of a State to claim the benefits of the act of a Government since overthrown. But it will hardly be insisted that every expenditure of that uprooted Government is of binding force upon the present State of Texas.

It is said the policy of courts is to restrict the effects of war

within the narrowest limits possible. This is not denied; but the disposition of courts is one thing, and their power, theoretically, at least, quite a different one. They may and ought to have the disposition to restrict, but it is not for them to fix the limit, when the political power has set a boundary for them.

The principle that there can be no interregnum is true in one sense. It is utterly misleading in the sense in which the counsel for the depositors uses it. It is true, courts and laws recognize *de facto* Governments, but it is not true at all that they are bound by the positive law of nations to abide by everything they do. It is a part of the law of England that a man, by adhering to a king *de facto*, does not incur the penalty of treason; but does that statute of Henry VIII go any further. It would be rather a more liberal construction than the law authorizes, to hold that by reason of this statute a nation was bound by any contract which a Government established for a day might make.

But it is said the bank is a mere trading corporation and not the State. I by no means admit this in the broad sense in which it is stated. But I do admit that the bank is a corporation, just to the extent that it is subject to suit, and it may make such contracts as the State has, by its charter, directed, or as it may by statute direct. Otherwise than for the purpose of suit, and of holding property, it is not separate from the State. It is a mere *State agency*, controlled by the State; its acts directed by the State; every act responds to the pulses of the State itself. Whenever the State is overthrown, the acts of the State are overthrown, and the acts of this agency, under the direction of the uprooted party in the State, go with the party. It was authorized by that party, and by that alone. If they prevail, the acts are valid; if they sink, the acts, as legal, binding acts, sink under the wave that submerges their author. The acts of their agent are not the acts of the lawful State bank; the contract is not hers. They may be the acts of the bank of that uprooted Government, but they are not the acts of the bank of that State Government which now stands upon the ruins of the

old. This is what the schedule of 1865 declares. This is what the act of 1866, (Feb. 16,) ch. 28, sec. 5, carries into the assignment.

The Bank of Tennessee is as much the creature and agent of the State as if it was the Treasury itself; as much so as the fiscus of the German States, where the Treasury is what we would call a corporation, subject to suit. Of course, such an ideal existence must have its legal existence with the government of which it is part, and be subject to its fate. It is supposed that this argument is like that which was urged against the bank when it was first chartered, that it was not a valid corporation, because it had no individuals named as corporators. In truth, the view I take and that are antipodal. I look exclusively at the substance, that stuck in the bark. I say the Legislature might declare the *Treasury safe* subject to suit, or the Treasury, and it would be so. As to the bank, it sets apart a particular fund, and allows that fund to be reached by a suit in a particular form against the bank. But the suit is, in substance, against that particular fund of the State, and so far a suit against the State, in substance, but not in form. It is clothed with certain incidents appertaining to individuals by the law of its creation, but it has only a formal existence separate from the State. Subject the Treasury to suit, and it will be separate to the same extent, nearly.

It is just on this point that the acts of the bank and those of individuals differ. Natural persons may, in a state of war, make contracts among themselves which are binding and obligatory, without reference to who prevails in the contest, and such contracts cannot be disturbed; but where the validity of the obligation depends upon the power to make it, and the power to make it depends upon which party the war decides to be the government, the principle to be applied differs *toto cœlo*.* Here the case of White *v.* The State of Georgia is

*NOTE.—On the analogy of *de facto* government of corporations, the case of R. *v.* Bridgwater, 3 Doug., 379, cited in Tapping on Mandamus, 166, is instructive:

"Where an officer *de facto* has been removed by a judgment of ouster, his acts are void. As, where a mayor *de facto*, who presided at the election of a new mayor, was subsequently removed by judgment of ouster, the election of the new mayor was held void."

distinguished from the present case. That was a contract before the war, and valid. Of course, the war could not affect it, and the obligation not depending on the result of the war, the State could not pass any law to impair it, after the war was over. The distinction is between impairing the obligation of a contract, and declaring a contract void for want of authority to make it.

Take the instance of the Franklin government, and suppose it to have seized upon the trustee of one of the counties it had assumed to control, and had, through him, attempted to force the county into contracts: would North Carolina have been bound to respect such contracts, or was it at liberty to say such are not the contracts of the county, but only of your agents therein, and they are not binding?

J. B. HEISKELL,
for Defendant in Error.

Nov 18. 78. Rec'd N. H. Swayne
7 Otto 2454
Oct. 1. 1878

CHARTER OF THE BANK OF TENNESSEE,

AND ACTS AMENDATORY OR RELATIVE THERETO.

Filed in Keith v. *Clark, Supreme Court, United States, No.* 67.

CHAPTER 107.

An Act to establish a State Bank, to raise a fund for Internal Improvement, and to aid in the establishment of a system of Education. [Passed January 19th, 1838.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That a Bank shall be and is hereby established, in the name and for the benefit of the State, to be known under the name and style of "The Bank of Tennessee," and the faith and credit of the State are hereby pledged for the support of the said Bank, and to supply any deficiency in the funds hereinafter specifically pledged, and to give indemnity for all losses arising from such deficiency.

SEC. 2. *Be it enacted*, That the capital of said Bank shall be five millions of dollars, to be raised and constituted as follows: the whole of the Common School Fund, whether the same is vested in stock in the present banks in the State, or in the hands of the Superintendent of Public Instruction, or in the hands of the county agents or other persons, except so much as may have been vested in any works of Internal Improvement, as well as the proceeds of the Ocoee lands, shall constitute a part of the capital of the Bank of Tennessee; the surplus revenue on deposite with the State, together with the unexpended interest thereon, shall also constitute a part of the stock of said Bank: and in addition to these amounts a sum shall be raised in specie, or funds convertible into specie at par value, on the faith of the State, sufficient to make the whole capital five millions of dollars: *Provided*, That if the fourth instalment of the surplus revenue, apportioned under the

act of Congress, approved 23rd June, 1836, should be deposited with this State, the amount received shall be added to and constitute a part of the capital of said Bank, and be an addition to the capital stock of five millions of dollars above specified: *Provided further*, That the stock owned by the State, in the Union Bank, shall not constitute any portion of the capital of the Bank of Tennessee.

SEC. 3. *Be it enacted*, That the money belonging to the Common School Fund, which now may be in possession of the Superintendent of Public Instruction, or which may hereafter come into his possession, shall be handed over to the president and directors of the Bank of Tennessee, as capital in said Bank, and said president and directors, or a majority of them, shall be authorized and required for and in behalf of the State, and with a pledge of the public faith and credit, to issue to the superintendent aforesaid State stock or certificates of debt, for such sum or sums as may be from time to time paid over by the said superintendent to the said president and directors; and the Governor of the State, the Comptroller of the Treasury, and the Superintendent of Public Instruction, shall dispose of the stock in any and all the Banks of the State belonging to the common school fund, whenever the same can be sold at par for specie, or funds convertible into specie, at par value, and pay over the proceeds to the president and directors of the Bank, who shall issue certificates of stock to the superintendent of public instruction as aforesaid: *Provided*, That any dividends on the same, which shall not be declared at the time of the sale, shall not be sold with the stock, but the same shall be received by the superintendent and paid over to the president and directors of the Bank, and shall constitute a part of the contingent fund, to meet the annual or semi-annual liabilities of the Bank, as shall also the interest and dividends which may hereafter arise on any portion of the capital of the school fund, before said capital is paid over to the president and directors of said Bank; and in like manner the superintendent of public instruction shall pay over the proceeds of the sale of the Ocoee lands as they are received, and take certificates of stock: *Provided*, That if a system of common schools shall be adopted and put into operation, by the present General Assembly, the funds which may accrue after the year 1837, for the benefit of common schools, from

the bonuses of the present Banks, and bonuses and dividends arising from other incorporate companies, and from privileges, fines, penalties, and taxes, shall constitute part of the annual fund for distribution by the superintendent and shall not be subscribed in stock in the State Bank. But should a system of common schools not be adopted as aforesaid, then said funds to be vested in stock in said Bank, until otherwise directed by the General Assembly.

SEC. 4. *Be it enacted*, That it shall be the duty of the Comptroller of the Treasury to draw from the Union Bank, the Planters' Bank, and the Farmers and Merchants' Bank, the amount of the surplus federal revenue now on deposite with said Banks, in two yearly instalments; the first instalment to be drawn on the 1st day of January, 1839, each instalment to be drawn in specie or funds convertible immediately into specie at par value; and as soon as each instalment is received, he shall pay over the same to the president and directors of the State Bank, and receive certificates of stock, which shall be kept by him for the benefit of the State: *Provided*, That if the said Banks, or either of them, shall fail or refuse upon demand made as aforesaid, to pay over the surplus, or any part which may be demanded at the times aforesaid, then the Comptroller shall direct suits to be instituted by the Attorney General of the State, for the amount so withheld, together with the ten per cent. authorized by their charters; and until said instalments are demanded, the present banks shall hold the surplus at the rate of six per cent. per annum, payable half yearly, and the interest so accruing shall constitute part of the sinking fund hereinafter designated.

SEC. 5. *Be it enacted*, That it shall be the duty of the Governor of the State, on behalf of the State, to execute the bonds of the State, for two and a half millions of dollars, which bonds shall be signed officially by the Governor, and countersigned by the Secretary of State, with the seal of the State affixed, and payable thirty years after date to the president and directors of the Bank of Tennessee, or their assigns, bearing an interest not exceeding six per centum per annum, which shall be payable semi-annually, at the office of the Treasurer of Tennessee, or at such other place within the limits of the United States, as the president and directors may select, which said bonds shall be delivered to the president and directors of said

Bank: *Provided*, The Governor shall execute said bonds of any amount, not less than one thousand dollars each, and payable in such denomination of money as the president and directors may require; which bonds and also those hereafter directed to be issued, to pay for stock in internal improvement companies, shall be made payable to, and be sold and disposed of by the president and directors of said Bank, for specie, or funds convertible into specie without loss, and shall not be sold at a discount. And whenever any State bonds may be issued for the benefit of any internal improvement company, as hereinafter directed, the Governor shall deliver them to the president and directors of the Bank, and the full amount thereof at their nominal value, when the proceeds are received by the Bank, shall be placed to the credit of the company, for whose benefit such bonds may be issued, and any premium for which such bonds may be sold, shall inure to the benefit of the State: *Provided*, That if at the end of ninety days after any bonds may have been delivered to the Bank, such bonds have not been sold at par, as herein provided for, then the president and directors of the Bank shall on application of the president and directors of the internal improvement company, for which such bonds were issued, deliver the same to them upon their receiving them in payment of the State's subscription at their nominal value; or the said president and directors of the Bank may at their election pay such internal improvement company the amount of such bonds, at their nominal value, and retain the same to be kept or disposed of for the benefit of the State.

SEC. 6. *Be it enacted*, That immediately after the location of the principal Bank and branches, the Governor of the State shall nominate and appoint twelve persons to act as directors, more than one-third of whom shall in no case be merchants; and which nomination and appointment shall be subject to confirmation or rejection by the General Assembly, and the twelve persons so nominated and confirmed shall constitute the directors—one of whom shall be president, who are hereby incorporated, and made a body politic and corporate, by the name and style of "The President and Directors of the Bank of Tennessee," and shall so continue until the 1st day of January, 1868, and by that name shall sue and be sued, plead and be impleaded, and they

are hereby made able and capable in law, to have, receive, purchase, enjoy, and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind, nature or quality soever, and the same to sell, grant, demise, alien, or dispose of; and also to make, have, and use a common seal, and the same to break, alter, and renew at their pleasure; also to ordain, establish, and put in execution such by-laws, ordinances, and regulations, as shall seem necessary and convenient for the government of said corporation, not being contrary to the laws and constitution of the State, or of the United States.

SEC. 7. *Be it enacted*, That the president and directors as elected, shall continue in office for two years and until their successors are nominated and confirmed as aforesaid.

SEC. 8. *Be it enacted*, That of the dividends which shall be declared by the Bank, one hundred thousand dollars shall be annually set apart for common schools, and the faith of the State is hereby pledged, for an annual appropriation of said amount to common schools, to be applied as the General Assembly may direct. Of the dividends of the Bank remaining, there shall be annually appropriated for thirty years, and no longer, or not so long, if the Bank should not continue so long in operation, eighteen thousand dollars to county academies, to be applied as the General Assembly may direct, and the faith of the State is hereby pledged for the annual payment of the said sum: *Provided*, The trustees of the respective county academies in the several counties of this State shall relinquish to the State all claims which they have against the State of Tennessee, for the debt due to those institutions from citizens residing south of French Broad and Holston, and west of Big Pigeon rivers, and all claims they may have to lands in the Ocoee District, as well as all claims which they have against said citizens, which relinquishment shall be filed in the office of the Secretary of State, and the proceeds of two half townships of land in the Ocoee district, reserved by the act disposing of said lands for the use of colleges and academies, shall be set apart for and given to the East Tennessee College and Nashville University, upon the Trustees of said institutions executing such relinquishments, as are herein directed for the academies; and *Provided further*, That such of said institutions as shall relinquish, as herein pro-

vided for, shall be entitled to their rateable proportion of the fund herein appropriated, according to the terms of said appropriation, and on such further conditions as the present General Assembly may prescribe, in the event the federal government shall hereafter relinquish to the State of Tennessee, the vacant lands south and west of the congressional reservation line, an amount of forty thousand dollars, out of the sale of those lands shall be set apart as a perpetual fund for the support of a College in the Western District: *Provided*, That the General Government in the act of relinquishment shall grant to the use of such College the appropriation herein made. The balance of the dividends shall be set apart as a sinking fund, to be applied to the extinguishment of the accruing interest on the bonds of the State, whether the same have been executed under any former act, or may be executed under this act.

SEC. 9. *Be it enacted*, That the following powers, rules, conditions, limitations, and restrictions, shall be fundamental laws of said Bank, viz:

ARTICLE 1. The board shall select one of their number to preside over their deliberations, who shall be elected by a majority of the Directors present, of whom not less than five, shall constitute a quorum to do business; and no person not a citizen of this State, or who is a stockholder, or director of any other Bank, or co-partner of any such director in trade and merchandise, shall be eligible as a director: *Provided*, Should it so happen that any director should be appointed, who is a stockholder or director in any other Bank, his seat shall be considered vacant and the place filled by the other directors as in other cases of vacancy; *and provided further*, If any director appointed as aforesaid shall, during his continuance in office, purchase stock or become a director in any other Bank, his seat shall be vacated, which shall be filled by the directory as in other cases.

ART. 2. The President and Directors for the time being, shall have power to elect and remove the cashier, and they shall also have power to appoint such officers, clerks, and servants under them as shall be necessary for executing the business of the said corporation, and allow them such compensation for their services, as may be reasonable.

ART. 3. No director shall be entitled to any emolument,

but the directors for the time being, shall have power to make such compensation to the president of the Bank, for his extraordinary attendance at the Bank and superintending its concerns as to them shall seem reasonable. No discount shall be made when the cashier may be a maker or endorser.

ART. 4. They shall receive money on deposite, and pay away the same to order, free of expense, deal in bills of exchange and buy and sell any of the State stock now issued, or that may hereafter issue, and discount notes at said bank with two or more good endorsers thereon, at a rate of interest not exceeding six per cent. per annum: *Provided*, That this article shall not be construed so as to prevent the said Bank from demanding and receiving a reasonable premium for exchange, in addition to the interest upon bills or notes payable at a point beyond the limits of this State. *Provided also*, That said Bank or either of said branches, never shall purchase and have running to maturity, or on hand, a greater amount of bills of exchange than the amount of notes under discount.

ART. 5. The total amount of debts which said corporation shall at any time owe, whether by bond, bill, note, or contract shall not exceed twice the amount of the capital stock paid in at the time over and above the moneys on actual deposite for safe keeping. Nor shall the entire amount of the risk or investment or securities in what form soever (save and except actual current coin) at any time exceed twice the amount of the capital stock paid in.

ART. 6. In case of excess the directors under whose administration it shall happen, shall be liable for the same in their private capacities, and an action of debt may in such case be brought against them or any of them or their heirs, executors or administrators, in any court of this State, having jurisdiction, by any creditor or creditors of the said corporation and may be prosecuted to judgment and execution; any condition, covenant and agreement, to the contrary notwithstanding. But this shall not be so construed to exempt said Banks or the lands, tenements, goods or chattels of the same, and on their insufficiency, the State of Tennessee being also liable for, and being chargeable with the said excess; such of the directors who may have been absent when said excess was contracted or created, shall be exonerated from individual liability—or who may

have dissented from the resolution or act by which the same was contracted or created, may respectively exonerate themselves from being individually liable, by entering, if present, their dissent on the Books of the Bank, at the time the debt may be so contracted, and forthwith give notice of the same to the comptroller of the State.

ART. 7. In the case of vacancy, occasioned by the death, resignation or removal out of the State or otherwise, of any director, a majority of the directors shall fill such vacancy, and the director so appointed shall hold his office during the unexpired term of the director so vacating; and in case of sickness or necessary absence of the president, the board may appoint a president for the time.

ART. 8. The directors shall keep fair and regular minutes of their proceedings, in a well-bound book, and on questions where two directors shall request it the yeas and nays shall be ordered; and on all such questions, every member present shall be required to vote; and these minutes shall at all times be produced on the demand of the Legislature, or any committee legally authorized to require the same.

ART. 9. Every president and cashier, before he enters on the execution of his duty, shall give bond with two or more securities, to the satisfaction of the directors, payable to the Governor of the State, in a sum not less than one hundred thousand dollars, conditioned for the faithful performance of his duty; and the tellers and clerks shall give like security in a sum not less than twenty thousand dollars, which bonds shall be filed and recorded in the Secretary's office.

ART. 10. The president, directors and cashier, and all other officers of the principal Bank and branches, shall take and subscribe the following oath, on entering on the duties of their respective offices: "I, A. B., do solemnly swear or affirm, that I will faithfully discharge the trust reposed in me as ——— of the Bank of Tennessee, and that I will not wilfully or knowingly violate any direction or provision of the charter thereof, So help me God."

ART. 11. All bills, bonds and notes of the corporation, shall be signed by the president and countersigned by the cashier thereof, and the fund of the Bank shall in no wise be held responsible therefor, unless the same shall be executed as aforesaid.

ART. 12. The bills or notes which it shall be lawful for said corporation to issue and circulate, shall not be for a less denomination than five dollars, and after the first day of January, 1841, not less than ten dollars.

ART. 13. The board of directors shall be capable of exercising such other powers and authorities as may be necessary for the well governing and ordering the affairs of the said corporation, and of promoting its interests and credit.

SEC. 10. *Be it enacted*, That the bills obligatory or of credit, under the seal of said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon under the hand or hands of such person or persons, and of his, her or their assignee or assignees, and so as absolutely to transfer and vest the property thereof in each and every assignee or assignees successively, and to enable such assignee or assignees, to bring and maintain an action thereupon in his, her or their name or names, and bills or notes which may be assigned by order of the said corporation, signed by the president and countersigned by the cashier thereof, promising the payment of money to any person or persons, his, her or their order, or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same in like manner and with the like force and effect as upon any private person or persons, if issued by him, her or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which are or shall be payable to any person or persons, his, her or their order, shall be assignable by endorsement in like manner as foreign bills of exchange now are, and those which are or shall be payable to bearer, shall be negotiable and assignable by delivery only.

SEC. 11. *Be it enacted*, That it shall be the duty of the president and directors of the principal bank and branches, to furnish to the General Assembly, within the first week of every regular session, statements of the amount of the capital stock of said corporation, and of the debts due the same, of the moneys deposited therein, of the notes in circulation, and of the cash on hand, together with all other property of said Bank, both real and personal, and the General Assembly shall have the right to inspect all such accounts in the Bank as relates to the transactions of

said principal Bank and branches, and shall, whenever it may be deemed necessary, appoint a joint committee of both houses of the General Assembly for that purpose, with full power to send for persons and papers; and it shall be the duty of the Comptroller to inspect all accounts in the books of the principal Bank and branches, as often as he may please; and it shall and is hereby declared to be his duty, faithfully to report all and every violation of the fundamental rules of this corporation to the Legislature.

☞ SEC. 12. *Be it enacted*, That the bills or notes of the said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State.

SEC. 13. *Be it enacted*, That a majority of the members present, at any regular meeting of the directors of the principal Bank and branches, may suspend any director with a view to his expulsion, and any member may be expelled, at a meeting of the board of directors specially convened by the president for that purpose, as soon after such suspension takes place as practicable; but such expulsion shall not be made by a majority of less than two-thirds of the whole number of directors.

SEC. 14. *Be it enacted*, That it shall be the duty of the comptroller to make a biennial report to the Legislature on the subject of the principal Bank and branches, and if in his opinion the transactions of the principal Bank and branches, or any particular circumstance relating thereto, shall require it, he shall apply to the General Assembly for a select committee, who shall take into consideration any matters relating to the principal Bank and branches, submitted to them by the comptroller, and report thereon, at the discretion of the Legislature; and the comptroller shall be furnished by the principal Bank and branches, with a general statement of their condition once in every month.

SEC. 15. *Be it enacted*, That it shall be the duty of the president and directors of the Bank, to publish quarterly in some newspaper, the state and condition of the Bank and its branches.

SEC. 16. *Be it enacted*, That if any president, director, or cashier, or other officers of the said Bank, or any of its

branches, shall embezzle or fraudulently convert to his or to their own use, any sum of money, bank note, bill of exchange, check, bond, or other security, placed under his care and management, the person so offending, his aiders, abettors, and counsellors, upon conviction thereof, shall be judged guilty of felony, and be sentenced to imprisonment in the State Penitentiary, for a term not less than three years, nor more than twenty-one years, the term to be fixed at the discretion of the jury trying said offense, and shall forever thereafter be disqualified from holding any office of profit or trust in this State, and shall moreover be liable for the sum embezzled.

SEC. 17. *Be it enacted*, That the sums discounted on notes, with two or more sufficient securities, as provided for by this act, shall be apportioned, as far as practicable, among the several counties in this State, annually, in proportion to the qualified voters, and the president and cashier of the Bank or branch, shall give notice in some public paper printed in the county in which the Bank or branch may be located, stating the amount that each county may be entitled to borrow, within ten days after the right to borrow in manner aforesaid may arise; and should the sum, or any part thereof, to which any county should be thus entitled, be not applied for within fifteen days after such notice, by the inhabitants thereof, by presenting bills or notes for discount, with good endorsers, then it may be discounted as aforesaid, to any person or persons applying for the same. The principal Bank and three branches shall be located in Middle Tennessee, two branches of the said Bank in the Western District, and two branches in East Tennessee.

SEC. 18. *Be it enacted*, That the lands, tenements, and hereditaments which it may be lawful for said corporation to hold, shall be only such as shall be requisite for its immediate accommodation for the transaction of its business, and such as have been *bona fide* mortgaged to it by way of security for, or conveyed to it in satisfaction of debts previously contracted in the course of ordinary banking business, or purchase at sales upon judgments or decrees rendered in favor of said Bank.

SEC. 19. *Be it enacted*, That it shall be the duty of the Governor, as soon as the directors are appointed of the principal Bank and branches, to convene the several boards of the same by advertisement in some newspaper, giving ten days' notice thereof, at the place the Bank or

branch may be located, for the purpose of carrying this act into effect.

SEC. 20. *Be it enacted*, That whenever the president and directors of any company incorporated for the purpose of internal improvement, shall negotiate any bonds executed under the provisions of this act, it shall be their duty to notify the president and directors of the Bank, of the place at which the interest on said bonds is stipulated to be paid, which shall be within the limits of the United States, and the president and directors of the Bank shall provide for the payment of the interest aforesaid, out of the dividends of the Bank: *Provided*, That if there shall be a surplus of the dividends, after setting apart the amount appropriated to common schools and academies, and after paying the interest on the bonds of the State, the same shall be held by the Bank as a contingent fund, to be appropriated at any time when there may occur a deficiency in the dividends for the purposes aforesaid: *And provided also*, That if at any time there shall be a deficiency in the dividends to liquidate the accruing interest on the State bonds, and the contingent fund shall be insufficient for such purpose, such deficiency shall be made up out of any uninvested dividends that may have been declared on the stock owned by the State, in the several works of internal improvement; and if there should still be a deficiency, the same shall be made up by the individual stockholders of the several roads in which the State has subscribed for stock, in proportion to the amount for which the State may have issued her bonds in each, the amount so paid by the several companies, to be reimbursed out of the first dividends declared in favor of the State on her stock in said companies. In the event the dividends of the Bank and the profits arising from the stock of the State in internal improvements shall prove insufficient to liquidate the interest on the bonds of the State issued for the purpose of internal improvement, it shall be the duty of the Governor to notify the president and directors of such companies in which the State has subscribed for stock, at least three months before the interest will become payable on the State's bonds, of the probable deficit, and of the amount which will be required of each company to be paid in order to meet the interest on the bonds of the State, and upon receiving such notice from the Governor, it shall be

the duty of the president and directors of each and every company thus notified, forthwith to make a call upon the individual stockholders, for an amount equal to the sum claimed by the Governor, in his notice to said companies, which sum or sums of money shall be paid at the time, place, and manner required by the Governor, and upon failure thereof, by any of said companies, to meet the instalment thus required, it shall be deemed and taken to be a forfeiture of the interest of the individual stockholder or stockholders thus failing to pay the instalment called for by the Governor: *And provided further*, That no State bonds shall be issued for the payment of State stock, in works of internal improvement, under the provisions of this act, until the Bank hereby established shall go into operation.

SEC. 21. *Be it enacted*, That the State of Tennessee shall become a subscriber for one half of the capital stock in all railroads, McAdamized turnpikes, graded turnpikes, and sanded turnpikes, for which acts of incorporation have heretofore been granted, or for which acts of incorporation may be hereafter granted: *Provided*, That the subscription on the part of the State shall not exceed an average of three thousand dollars per mile in any company for McAdamized turnpikes, nor shall it exceed one thousand dollars per mile on graded turnpikes, nor seven hundred and fifty dollars per mile in sanded turnpikes; *Provided also*, The subscription by the State to the Charleston and Cincinnati railroad, and the Hiwassee railroad, shall not exceed one million three hundred thousand dollars, to be equally divided between them, and to be expended within the State of Tennessee.

SEC. 22. *Be it enacted*, That whenever the Governor shall be notified in writing by the president and directors of any company, for the construction of railroads, McAdamized turnpikes, graded turnpikes, or sanded turnpikes, that one half of the capital stock of said company has been subscribed for, thereupon the Governor shall appoint a number of directors, not to be stockholders, equal to the number elected by individual stockholders, and if in the opinion of two-thirds of said entire board, the payment is well secured by the individual stockholders, or that the individual stockholders are good and solvent persons, and fully able to pay the amount of stock subscribed for by each

of them, and that they have paid ten per cent. upon the stock, the Governor of the State is hereby authorized and empowered, and required to subscribe on behalf of the State for the amount provided for in the foregoing section; and from the date of the subscription by the Governor, the State shall have a lien upon the property of each individual stockholder, to the amount of the stock owned by each, and upon failure of any stockholder to pay any subsequent instalment after the first, such failure shall not operate as a forfeiture of the stock, unless the president and directors shall so agree, but payment shall be enforced by the president and directors, and no transfer or assignment of stock shall defeat the said lien: *Provided*, That said lien shall cease after the individual stockholders shall have paid in one half their stock.

SEC. 23. *Be it enacted*, That whenever the individual stockholders of any of the said companies in which the State has become a stockholder under this act, shall have paid five per cent. in addition to the ten per cent. heretofore provided to be paid, making fifteen per cent. upon the amount of their stock, and the president and directors of such company shall notify the Governor of that fact, he is hereby authorized and required to issue the bonds of the State, signed officially by him and countersigned by the Secretary of State, with the seal of the State, payable thirty years after execution, and bearing an interest of five per cent. per annum, payable semi-annually at the office of the Treasurer of Tennessee, or such other places as the president and directors negotiating the same may designate, for an amount equal to fifteen per cent. of the stock subscribed by the State in said company, and deliver said bonds to the president and directors of said company, in full payment of fifteen per cent. of the State subscription. And upon the further payment of fifteen per cent. upon the stock of individual stockholders in any of said companies, the Governor shall issue the bonds of the State for fifteen per cent. or more of the stock of the State, in the same manner and under the same rules, regulations, and restrictions as hereinbefore provided; and upon the further payment of five per cent. or more upon the stock of individual stockholders, the Governor is authorized and required to issue the bonds of the State for the like proportion of the stock due by the State, under the same

rules, regulations, and restrictions as before. And in like manner, the amounts paid by individuals and the State, at the several subsequent calls shall be equal, until the whole amount required to complete the work is paid in; and from time to time he shall take the receipts of the president and directors for the several sums as paid. So soon as the president and directors of the Louisville, Cincinnati and Charleston Railroad Company, shall certify to the Governor of the State that the stockholders of said company have paid in five per cent. on their stock, the Governor of the State shall subscribe on behalf of the State, six hundred and fifty thousand dollars in stock in said company, and shall issue bonds of the State to said company for five per cent. on the State stock so subscribed, subject nevertheless to the conditions hereinafter provided. And as soon as the president and directors of the Louisville, Cincinnati and Charleston Railroad Company, or a board of directors appointed by said company, to construct that part of the road lying within the limits of Tennessee, shall certify to the Governor that a sum has been paid in for the construction of said road within the limits of Tennessee, by individual stockholders upon their stock, equal in amount to fifteen per cent. upon the amount to be subscribed by the State, the Governor shall execute the bonds of the State to said company for the amount of fifteen per cent. of the six hundred and fifty thousand dollars of the stock to be subscribed by the State. And whenever individual stockholders in said road shall have paid in a further sum upon their stock, equal in amount to fifteen per cent. upon the stock subscribed by the State, the Governor shall issue the bonds of the State for fifteen per cent. of the remaining stock of the State; and upon the further payment by individual stockholders of an amount equal to five per cent. or more on stock subscribed by the State, the Governor shall issue bonds for five per cent. or more of the State stock, and so on in like proportion until the whole amount is issued, all of which is to be laid out within the limits of the State. And whenever the president and directors of the Hiwassee Railroad Company shall notify the Governor in writing, of the amount of stock subscribed by individuals in said company, the Governor shall subscribe for an equal amount of State stock: *Provided*, Such amount does not exceed six hundred and fifty thou-

sand dollars, subject to the same rules as to issuing the bonds of the State as is pointed out by this act for the government of other railroads and McAdamized turnpike companies: *Provided*, That if the six hundred and fifty thousand dollars should not be subscribed by individuals for stock in said company, and a certificate of that fact made out to the Governor on or before the first day of October next, agreeably to the provisions of this act, so as to authorize the Governor to subscribe for the full amount of the six hundred and fifty thousand dollars in said company, the Governor shall subscribe for an equal amount of stock in said road, as is or shall be subscribed by individuals, and certified as is directed by the 21st and 22nd sections of this act, and the remainder of the six hundred and fifty thousand dollars shall be subscribed by the Governor to any McAdamized, sanded, or graded turnpike road company in East Tennessee that shall bring themselves within the provisions of this act. And the Governor is hereby authorized from time to time, to constitute and appoint proxies to vote for directors in said Louisville, Cincinnati and Charleston Railroad Company, and such proxies shall give all other votes he may be authorized to do by virtue of such appointment agreeable to the provisions of said charter. *And provided further*, That if the Louisville, Cincinnati and Charleston Railroad Company, or the Hiwassee Railroad Company, or either of them, shall fail to obtain the subscription on the part of the State on or before the first day of January, 1839, then and in that case, it shall be the duty of the Governor to subscribe for stock in such turnpike roads in East Tennessee as may bring themselves within the general provisions of this act.

SEC. 24. *Be it enacted*, That the State of Tennessee shall have a lien on the entire works of said companies respectively, for the amount so paid in by the State. And in all, the profits, rents and tolls of said companies shall inure to the benefit of the State, until individual stockholders shall have paid in their entire stock in said companies respectively: *Provided*, The right and lien on the part of the State to the entire profits, rents and tolls of the said several works, shall not inure until twelve months after the execution of the bonds of the State, for the last instalment on her stock as aforesaid, and then only to the extent of that portion of the individual stockholders who have not paid

up the entire amount of their stock, and to remain no longer than said defaulting stockholders fail to pay the same.

SEC. 25. *Be it enacted*, That the stock to be taken by the State in the several improvements, shall not exceed four millions of dollars, to wit: one million four hundred thousand dollars in East Tennessee, one million six hundred thousand dollars in Middle Tennessee, and one million of dollars in the Western District: *Provided*, That one hundred thousand dollars shall be raised upon the bonds of the State, and be expended as a portion of the fund allotted to East Tennessee upon the rivers in East Tennessee, as the General Assembly may hereafter direct; and provided also, that one hundred thousand dollars of the fund allotted to the Western District of Tennessee, be expended upon the rivers in that part of the State, as the General Assembly may hereafter direct; and provided, that one hundred thousand dollars of the fund allotted to Middle Tennessee shall be appropriated to the rivers of Middle Tennessee.

SEC. 26. *Be it enacted*, That the profit arising upon the stock owned by the State in the several works of internal improvement, shall constitute a fund to be applied to the redemption of the bonds of the State executed and to be executed for raising the Bank capital herein provided for, and the internal improvement bonds of the State.

CHAPTER 108.

An Act supplementary to an act to establish a State Bank, to raise a fund for Internal improvements, and to aid in the establishment of a system of Education. [Passed January 26, 1838.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the president and directors of the principal Bank shall locate the branches and appoint twelve directors for each branch of the Bank of Tennessee, of whom one shall be from each of the counties adjoining the one in which the branch is located: *Provided*, That it shall not reduce the number in the county in which the branch is located to less than seven, who shall remain in office for twelve months, and until their successors are appointed and qualified in the way, possess the qualifications, be subject

to the disqualifications and liabilities, and shall have the powers and perform the duties so far as the same apply, as the directors of the principal Bank. And the board of directors of the branches respectively shall be under the same rules and regulations as the board of directors of the principal Bank; but the board of directors of the branches may make necessary by-laws for their government, not inconsistent with this act and the act to which this is a supplement, and not inconsistent with the controling power given to the principal bank over said branches; vacancies in the board of directors at the branches shall be filled by the boards at the branches respectively; the officers and servants of the branches shall be appointed by the board of directors at the branches; officers and servants of the branches shall be qualified, and be subject to the same penalties as officers and servants of the principal bank.

SEC. 2. *Be it enacted*, That when the five millions of the capital stock shall be paid in, the president and directors of the principal Bank shall pay over to the several branches of said Bank, at least four hundred thousand dollars each as the capital respectively of said branches: *Provided*, It shall be the duty of the president and directors of the principal Bank, to employ three millions two hundred and fifty thousand dollars of the capital stock at the different branches, when the whole is paid in, and if upon the report of the president and directors of any branch or branches, authorized to be located by this act, or the act to which this is a supplement, the sum of four hundred thousand dollars cannot be employed at any of such branches, so as to yield, after defraying all expenses, a net profit of eight per cent. it shall in such case, be the duty of the president and directors of the principal bank to withdraw so much thereof as cannot be profitably used, and to transfer the same to such other branch or branches where it can be used best for the interest of the bank and the people, subject to be withdrawn and employed and transferred to any other branch or branches where the same can be used most profitably: *Provided also*, The president and directors of the principal bank shall not employ more than one million seven hundred and fifty thousand dollars at the principal bank, unless it shall appear from the reports of the branches that the amount beyond the said sum cannot be employed at a net profit of at least eight

per cent. at any or all of the branches: *Provided further*, That the president and directors shall not reduce the amount of capital of either of the branches to a less sum than three hundred thousand dollars. The first distribution of capital shall be made to the branches when the principal Bank shall go into operation, and of the first distribution of capital derived from the sale of the State bonds, at least two hundred thousand dollars shall be paid over to each branch; and not more than seven hundred and fifty thousand dollars shall be retained by the principal bank for banking purposes.

SEC. 3. *Be it enacted*, That each of said branches shall make semi-annual dividends of the net profits, which shall forthwith be paid to the principal Bank, who shall provide for the payment of the interest on the State bonds, and the annual dividends for the support of academies and common schools, as provided for by the act to which this is a supplement.

SEC. 4. *Be it enacted*, That whenever in the opinion of the president and directors of the principal Bank, a change of policy in the management of any particular branch or of the whole is required for the general benefit of the institution, they shall have power to call a convention of delegates from all the branches, to be composed of one member from each board of the branches, and the president and directors of the principal Bank, to consult and advise in relation to the same, and whatever may be determined on by a majority of said convention, the same shall be the governing policy of the institution.

SEC. 5. *Be it enacted*, That within thirty days after the appointment of the directors of the different branches, it shall be the duty of the president of the principal Bank to call a convention of delegates from the branches, to be composed of the president of each of the said branches, and the president and directors of the principal Bank, whose duty it shall be to adopt the necessary rules for the intercourse between said principal Bank and branches. The proceedings of said convention shall be entered of record at the principal Bank by ayes and noes.

SEC. 6. *Be it enacted*, That in all cases the funds received as capital by the president and directors of the principal Bank, from time to time, shall be distributed in the aforesaid proportions, in kind and value to the respective

branches; and in like manner when the principal Bank shall negotiate any bonds for internal improvement purposes, the funds procured shall be distributed in the same proportion in kind and value to the branches, upon their placing the proper amount to the credit of the internal improvement companies in their books.

SEC. 7. *Be it enacted*, That the notes to be issued by the Bank of Tennessee for circulation, shall be signed by the president and countersigned by the cashier of the principal Bank, and the same may be made payable at such place or places as shall be deemed most advisable by the board of directors of the principal Bank. The notes of the Bank or branches shall be received in payment of debts to the principal Bank or branches: *Provided*, That if at any time the president and directors of the principal Bank shall deem it to the interest of the institution, they may authorize the president and cashier of any branch or branches to sign and countersign any or all of the notes to be issued for circulation by such branch or branches: *Provided further*, That in furnishing the branches with notes to be issued for circulation, the president and directors of the principal Bank shall distribute to each an amount of notes equal to double the amount of capital assigned to the branches respectively.

SEC. 8. *Be it enacted*, That the bonds of the State for raising three hundred thousand dollars for the improvement of the navigation of the rivers, shall be executed and negotiated by the commissioners at the same time that the bonds for raising the capital of the Bank shall be negotiated, and the proceeds shall be deposited in the Banks in the three divisions of the State, in equal portions, and the amount so deposited be drawn in the notes of said Banks to be applied as provided by law.

SEC. 9. *Be it enacted*, That each branch shall render to the principal Bank, monthly statements of the condition of such branch, including a list of all the notes and bills purchased, together with the endorsers and acceptors on the same, and which shall be filed.

SEC. 10. *Be it enacted*, That no director of the principal Bank or branches who is under protest at said Bank or any of its branches, shall sit in any board of directors whilst under protest at any of said banks; and if any such director remains under protest for the space of thirty days, he

shall forfeit his directorship. No director shall act as attorney at law for said Bank or branches.

SEC. 11. *Be it enacted*, That the bonds of the State to be issued under the provisions of the act to which this is a supplement, shall be engraved under the direction and superintendence of the Governor and Secretary of State; and the comptroller of the treasury is hereby required to issue his warrants upon the treasury from time to time, for such an amount as may be necessary to defray the expenses of such engraving.

SEC. 12. *Be it enacted*, That the provisions of the law passed at the present session of the General Assembly, authorizing the Governor to subscribe one half of the stock in works of internal improvement, shall be so construed as to apply to McAdamized roads, and the Lagrange, Somerville and Memphis railroad, when part of the stock has been subscribed by individuals, and the Governor has subscribed the one-third of the stock so taken, but which is not sufficient to construct the said roads; in such cases the Governor shall, agreeably to the provisions of the act to which this is a supplement, subscribe the one half of the capital stock of said companies, or a sum equal to the whole stock taken by individuals in said roads.

SEC. 13. *Be it enacted*, That the principal Bank in the State shall be located at Nashville.

CHAPTER 139.

An Act to provide for the collection of demands due the State or due the Bank of Tennessee, or other demands in which the State has an interest. [Passed January 28th, 1840.]

SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That when any demand or right of action shall accrue to the State of Tennessee, or to the Governor of the State, or to the Bank of Tennessee, except bills or notes discounted by said Bank, or to the person or corporation entitled to the custody or possession of the common school fund, or any other demand or right of action shall accrue in which the State shall have an interest, it shall be the duty of the Governor, Comptroller of the Treasury, or Bank of Tennessee, as the case may be, to give information

thereof to the attorney general of the district in which the person against whom such demand or right of action has accrued, or any of them, may reside, together with all evidence within their possession or knowledge in support of such demand or right of action; and it shall be the duty of the attorney general to whom such information may be given to commence and prosecute any suit or suits for the recovery of such demand, and no security for costs shall be required in such case; and when such case shall be taken by appeal or writ of error to the Supreme Court it shall be the duty of the attorney general of the State to attend to the same.

SEC. 2. That it shall be the duty of the attorney general as aforesaid to prosecute suits in equity as well as at law for the recovery of the demands aforesaid, and also for the prevention of mischief and the preservation of the rights and interest of the State and the common school fund, and the judges shall be authorized to grant writs of *ne exeat*, injunction, attachments and all other extraordinary process without security being required as in other cases.

SEC. 3. That the cost in all the foregoing cases shall be paid as the court shall adjudge; and if judgment be given against the State, the same shall be paid by the Bank of Tennessee if the Bank is a party; or out of the common school fund if the suit is on account of that fund, to be paid by the officer or corporation having the custody thereof; or out of the Treasury of the State, upon the warrant of the Comptroller, if the Governor or State is a party.

SEC. 4. That this act shall apply to all demands and rights of action which have heretofore accrued as well as those which shall hereafter accrue.

SEC. 5. *Be it enacted*, That all laws and parts of laws which may be construed to authorize the Bank of Tennessee to sue for any part or portion of the moneys belonging to the school fund be and the same are hereby repealed: *Provided, always*, That this act shall not be construed to apply to the regular and legitimate business of said Bank upon the school moneys.

SEC. 6. *Be it enacted*, That the State of Tennessee shall be and is hereby authorized to commence and prosecute suits for all causes of action accrued or accruing to the State in all of the courts of the State according to the laws of the land as in other cases, and that the State shall have

the power to prosecute suits for any cause of action accrued or accruing to the State from any individual or association of individuals who have assumed the name and powers of a corporation or having acted as a corporate body, the same not being a corporation by the laws of this State.

CHAPTER 96.

An Act to regulate the salaries of the Bank of Tennessee and branches. [Passed January 28th, 1840.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the respective officers of the Bank of Tennessee and branches shall for their services receive the following salaries, to be paid by the Bank or branch in the service of which they may be severally employed, and charged to expense account of the same, to wit: the president of the principal Bank eighteen hundred dollars per annum; the cashier of the principal [Bank] eighteen hundred dollars per annum; the teller twelve hundred dollars per annum; each clerk in the principal Bank one thousand dollars per annum; the president of each branch four hundred dollars per annum; the cashier of each branch one thousand dollars per annum; each clerk in a branch five hundred dollars per annum.

SEC. 2. *Be it enacted*, That it shall not be lawful for a greater number of officers to be employed at any branch of the Bank of Tennessee, except the directory, than one president, one cashier and one clerk; and it shall not be lawful for a greater number of officers to be employed at the principal Bank of Tennessee than one president, one cashier, one teller and three clerks, except the directory.

CHAPTER 77.

An Act to provide for the payment of two hundred thousand dollars to East Tennessee and the Western District, in full discharge of their claim against the State for River Bonds, under the act of 1837-8, and for other purposes. [Passed January 31, 1842.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That two boards of Commissioners shall

be appointed by the Governor of this State to consist of five persons each, in each of the two grand divisions of this State, East Tennessee and the Western District, who shall perform the duties hereinafter required, with power to appoint such agents under them as may be necessary for carrying out the purposes of this act.

SEC. 2. *Be it enacted*, That there is hereby appropriated to the two grand divisions of this State, commonly called East Tennessee and the Western District, the sum of two hundred thousand dollars, for the improvement of the navigation and clearing out the navigable rivers in said two divisions of the State in lieu of the provision made therefor by an act passed January 19th, 1838, entitled "An act to establish a State Bank to raise a fund for Internal Improvements and for other purposes."

SEC. 3. *Be it enacted*, That one hundred thousand dollars of said sum be appropriated to the said Western District and one hundred thousand dollars to East Tennessee, and that the same be paid severally to the Boards of Commissioners above mentioned in the manner and out of the funds hereinafter provided.

☞ SEC. 4. *Be it enacted*, That the Bank of Tennessee shall pay for the purposes aforesaid the said sum of two hundred thousand dollars to the persons and in the manner hereinafter prescribed.

☞ SEC. 5. *Be it enacted*, That said Bank shall pay, if required, in the manner hereinafter set forth, one half of said sum of two hundred thousand dollars before the first day of April, 1843, and one half of said sum before the first day of April, 1844.

☞ SEC. 6. *Be it enacted*, That said boards of commissioners respectively are hereby authorized and empowered to draw upon the branches of said Bank in East Tennessee and the Western District, nearest to the points where the work of improvement in said rivers is in progress, for all sum or sums of money as may be necessary in carrying on such work in each and every period of three months from and after the first of April next: *Provided*, That the sums so to be drawn from said Bank shall not in the whole exceed the amount above appropriated: *And provided*, That in no term of three months shall more than one fourth of one hundred thousand dollars be drawn by both of said boards of commissioners: *And provided further*, That no

money as above provided shall be drawn unless to pay for work actually done by said boards of commissioners, or their servants or agents.

SEC. 7. *Be it enacted*, That the amount of money so to be drawn from the said branches shall be a charge *pro rata* upon the principal Bank and all its branches in proportion to the capital heretofore apportioned to each, which shall be regulated by drafts from said branches on said principal Bank and the other branches.

SEC. 8. *Be it enacted*, That each of said boards may appoint other boards of commissioners or agents for the different rivers in their respective divisions aforesaid, whose duty it shall be to superintend the various improvements to be made on the several rivers upon which they shall be appointed commissioners, and said several boards of commissioners and their agents shall perform all the duties heretofore required by the different acts appointing river commissioners, and shall have the same powers.

SEC. 9. *Be it enacted*, That whenever a draft shall be made upon said branches for money as aforesaid, it shall be accompanied by an affidavit of the said commissioners, or a majority of them, of the amount of work done, that the same is done at reasonable prices, and an account of the work so done and where done, and thereupon it shall be the duty of said Bank to pay such draft to said commissioners, whose duty it shall be to see to the application of the same.

SEC. 10. *Be it enacted*, That said boards of commissioners shall report to the General Board of Internal Improvement for the State their progress from time to time, the amounts of money drawn out and expended, together with any documents and evidences to sustain the same, and said General Board shall report the same to the Legislature at its next session.

SEC. 11. *Be it enacted*, That the members of said two boards of commissioners shall each receive two dollars for each day they may be engaged in the discharge of their duties as commissioners.

SEC. 12. *Be it enacted*, That the above appropriation of two hundred thousand dollars shall be held and taken in full satisfaction of all demands of said two divisions of the State for river bonds provided under the act above referred to.

SEC. 13. *Be it enacted*, That the said sums of money so to be drawn from said Bank by said commissioners, shall be applied by said commissioners in such manner as is now provided by law.

☞ SEC. 14. *Be it enacted*, That the bonds for two hundred thousand dollars issued and deposited in the Bank of Tennessee under the act of 1837–38, for the improvement of the rivers in East Tennessee and the Western District, be cancelled and burnt by the President and directors of the principal Bank of Tennessee at Nashville.

SEC. 15. *Be it enacted*, That all laws coming within the meaning of this act and inconsistent therewith, be, so far as they are inconsistent, and the same are hereby repealed.

SEC. 16. *Be it enacted*, That the amount hereby appropriated shall be received by said commissioners in current Bank notes of the State of Tennessee at their nominal value.

SEC. 17. *Be it enacted*, That of the proceeds of the sales of public lands that may be apportioned to this State, under the act of Congress entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant preemption rights," that portion authorized by the Constitution of this State to be appropriated to Internal Improvement, to wit: one half of said fund apportioned as aforesaid, shall be deposited in the Bank of Tennessee and branches, in lieu of the moneys required by this act to be advanced by said Bank and branches for the improvement of the rivers in the Eastern and Western divisions of this State: *Provided*, Said fund that may be apportioned to this State under the aforesaid act shall be received by this State: *And provided*, That nothing in this act shall be so construed as to change any of the appropriations made to particular rivers in East Tennessee.

CHAPTER 180.

An Act to dispose of that portion of the moneys arising from the sale of the public land to which Tennessee may be entitled under the act of Congress of the extra session of 1841, commonly called the Distribution Bill. [Passed February 3, 1842.]

☞ SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the President of the Bank of Ten-

nessee be, and is hereby constituted and appointed, the agent of the State of Tennessee, with full power and authority to receive from the Treasurer of the United States, such amount and portion of the moneys arising from the sales of the public lands, which may be apportioned to the State of Tennessee, under the act of Congress above mentioned, entitled an act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights, approved Sept. 4th, 1841.

SEC. 2. *Be it enacted*, That the moneys so received by said agent, shall be by him paid forthwith, with any premium which may be received thereon for difference of exchange, deposited in the Bank of Tennessee, to be disposed of as hereinafter directed.

SEC. 3. *Be it enacted*, That one half of said fund be appropriated for the benefit of common schools, and be held by said Bank as part of the common school fund of this State, and that the same be used and disposed of as the other portions of said school fund, as provided by the 8th section of the act of the General Assembly of the 19th January, 1838, establishing the Bank of Tennessee; the interest or dividends on which shall be distributed in like manner, as is provided by said act, and other acts of this State, in regard to interest or dividend on other portions of the common school fund.

SEC. 4. *Be it enacted*, That the remaining one half of said fund thus deposited, be applied by the President and directors of said Bank, to the purchase of bonds of the State, issued for purposes of Internal Improvement, whenever an opportunity may offer to make such purchases, which said bonds, so purchased, shall be cancelled by said President and directors, and an account thereof, kept and rendered to the Legislature; and, in the mean time, the said President and directors are hereby authorized to bank upon said fund, keeping a separate account of the interest or profits arising therefrom, and should there, at any time, not be a sufficient amount made by said Bank, on its ordinary capital, to pay the interest on the Internal Improvement bonds issued by the State, and at the same time to pay the other demands on said Bank, said President and directors are hereby authorized to apply the interest or profits, so made, on said deposit, to the extinguishment and payment of interest on out-standing Internal Improvement bonds; but should such

draft on, or application of said profits not be necessary to the whole amount thereof, then said profits or interest, together with the principal fund unexpended in the purchase of bonds as aforesaid, shall be and remain in said Bank as a sinking fund for the final payment of any out-standing Internal Improvement bonds, when the same may become due, and the said fund, with the profits thereon, of which a separate account is to be kept as aforesaid shall in any contingency which may render it necessary, be considered a preferred debt of said Bank, and shall be paid accordingly.

SEC. 5. *Be it enacted*, That said Bank shall report to the Legislature at each regular session thereof, the state and condition of the said one-half of said fund, and the action of the Bank in the disposition thereof, and the profits thereon.

CHAPTER 9.

An Act for the relief of debtors to the Bank of Tennessee and its Branches. [Passed November 16, 1842.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall and may be lawful for the Bank of Tennessee and its branches to discount notes for all sums not less than fifty dollars.

SEC. 2. *Be it enacted*, That in all cases where any person or persons may have heretofore become indebted to the Bank of Tennessee, or any of its branches, upon notes discounted, and upon which suits have not been instituted, it shall be the duty of said Bank or branches to continue regular discounts on said notes, until the amount of each note is reduced to fifty dollars, if the amount called for shall be paid: *Provided*, That in all cases the drawer or drawers of such notes shall secure the same by good and sufficient endorsements.

SEC. 3. *Be it enacted*, That in cases where suits have been commenced by the Bank of Tennessee or its branches, upon notes heretofore discounted, it shall and may be lawful for said Bank or branches to dismiss such suit or suits, upon the payment of the costs of the same by the defendant, and all interest which may have accrued upon said note or notes, by the maker or makers of said notes, and the usual

call after the same became due and payable to the time of dismissing said suit or suits, and upon payment of said interest and cost, and take from the drawer or drawers of said note or notes, new notes, well endorsed and secured: *Provided*, The second section of this act shall apply only to accommodation notes.

CHAPTER 105.

An act to amend an act entitled "An act to establish a State Bank, to raise a fund for internal improvements, and to aid in the establishment of a system of education," and an act supplemental thereto. [Passed Jan. 16, 1844.]

SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the act of 1838, chapter 107, and the acts supplemental thereto, chap. 108, be amended in the manner hereinafter specified.

SEC. 2. *Be it enacted*, That the directors of the principal Bank, two-thirds concurring, shall have power to remove any director of any branch for neglect of duty or improper conduct, and appoint another in the place of such as may be removed; the reason for which removal shall be given in their report to the ensuing Legislature: *Provided*, That a mere non-compliance with the instructions of the directors of the principal Bank shall not be deemed a sufficient cause for removal: *And provided further*, That the operations of the branches in discounting shall not be more restricted at any time than those of the principal Bank.

SEC. 3. *Be it enacted*, That the power of the Bank to deal in bills of exchange shall extend to one-half the amount of its capital: *Provided*, That should bills be not presented of a satisfactory character, the Bank and branches may continue to discount notes as heretofore.

SEC. 4. *Be it enacted*, That the branches shall pay to the principal Bank semi-annually all the profits of said branches, and furnish a list of their notes under discount, and a statement generally of their condition whenever required by the principal Bank: *Provided*, There shall not be any thing in this act so construed as to authorize the President and directors of the principal Bank to draw the specie from the branch Banks.

SEC. 5. *Be it enacted*, That the salaries of the President

and Cashier of the principal Bank of the Bank of Tennessee shall be equal, and that each of said officers shall receive an annual salary of two thousand dollars per annum, and no more.

CHAPTER 164.

An act to authorize the President and directors of the Bank of Tennessee to draw upon the Treasurer of the State in case of a deficiency of means in the Bank to meet its current liabilities, and to amend the revenue laws of the State. [Passed January 27, 1844.]

☞ SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That if at any time the dividends of the Bank of Tennessee shall be insufficient to meet its liabilities, it shall be the duty of the Cashier of said Bank, under the directions of the President and directors thereof, to make out and present to the Comptroller of the Treasury, a statement of the amount of the deficiency, and of the object of expenditure for which it has occurred, and if the said Comptroller be satisfied that such a deficit actually exists, said Comptroller shall thereupon issue a warrant for the amount of said deficiency, directed to the Treasurer, whose duty it shall be to pay the same upon presentment by the Cashier of said Bank: *Provided*, There be in the Treasury money not otherwise appropriated: *And provided further*, That the Comptroller shall, in no case, draw upon the Treasurer when the payment of said draft would reduce the amount in the Treasury below the current expenses of the State Government.

SEC. 2. *Be it enacted*, That it shall be the duty of the Comptroller and Treasurer, in addition to the matters and things now required to be reported by them to each General Assembly, to report all sums of money that may be paid by the Treasurer under the provisions of this act, specifying the date, number, and amount of each warrant so issued, and the object for which the same was issued and paid.

CHAPTER 209.

An act to provide for the collection of the dividends of the State on her stock in Internal Improvements, and for other purposes.

SEC. 2. *Be it enacted*, That the 20th section of the act of 1837–8, chap. 107, shall be so construed as to make it the duty of the President and directors of the Bank of Tennessee to notify the Governor when a deficiency exists in the profits of said Bank, such as will render it incumbent on the last-named officer to serve on the several Internal Improvement companies of this State the notification directed in said section of said act.

CHAPTER 131.

An Act to amend an Act passed 19th January, 1838, to establish a State Bank, and to raise a fund for Internal Improvements, &c. [Passed January 30, 1846.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the President and directors of the Bank of Tennessee, be, and are hereby, required to discontinue the branches of said Bank at Athens, Clarksville, and Columbia, and that they appoint an agent at each place to wind up the concerns in such way as to collect all the debts due, in not exceeding three years from this date, which agent shall give bond in the sum of $30,000, with good security, and be subject at all times to the orders of the principal board.

SEC. 2. That as fast as said agent collects in the debts of said branches, he shall transmit the same to the principal Bank, to be by the board vested in State bonds, or in banking at the branches, as said board may find most advantageous.

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643. Every person charged with the collection of State revenue may at any time in the fiscal year, and shall once in every six months, make a statement under oath of the amount collected by him to the date of the statement, and

deposit the money, together with the statement, in the Bank of Tennessee, or some branch of the same, to the credit of the Treasurer.

644. The cashier shall thereupon give the depositor a certificate of deposit, stating the amount so deposited, enter the same to the credit of the Treasurer, and give him and the Comptroller notice of the deposit.

645. The Bank or branch shall receive from the officer any bank notes which he may lawfully receive in payment of revenue.

646. A failure to make the aforesaid semi-annual statement and payment, shall be a misdemeanor, on conviction of which the delinquent shall be dismissed from office.

647. All the revenue received by the collector of public taxes not so deposited, shall for each year be due and payable on the last day of such year, and the collector shall account for and pay over the same to the Treasurer on or before said day every year, except that portion which is collected for lands reported for non-payment of taxes, which shall be accounted for and paid to the Treasurer on or before the first day of August after the sale.